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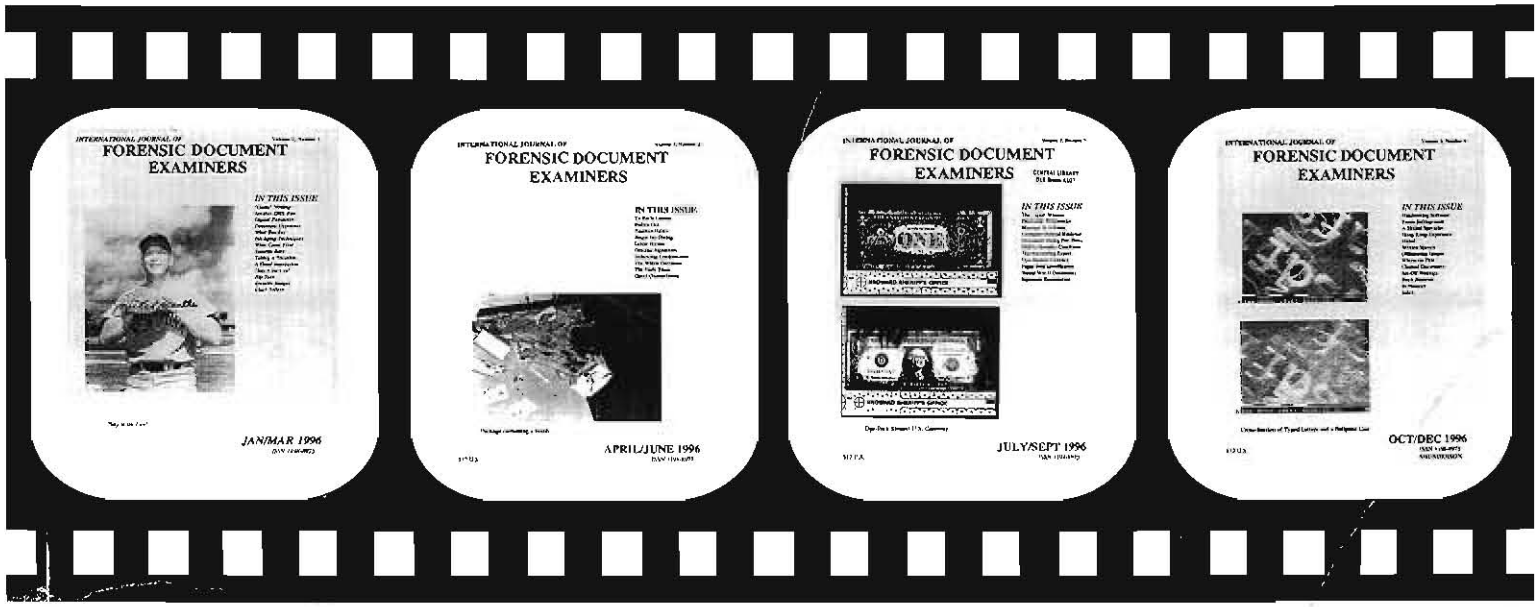

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CASE CITATIONS RELATING TO COURT ORDERED EXEMPLARS AND DISGUISE OF SAME AS CONTEMPT OF COURT AND OBSTRUCTION OF JUSTICE: A DISCUSSION AND INTERPRETATION[1]

A list of case rulings where the court addresses the acquisition of handwriting samples.

by Marcel. M. Matley[2]

REFERENCES: Matley, M. M., **"Case Citations Relating to court Ordered Exemplars and Disguise of Same as Contempt of Court and Obstruction of Justice: A Discussion and Interpretation,"** *International Journal of Forensic Document Examiners*, Vol. 5, Jan/Dec 1999, pp. 146-174.

ABSTRACT: Court cases are surveyed which rule that handwriting exemplars are not testimonial and court ordered exemplars are not in violation of any constitutional rights. Some practical pointers for the expert are given, and where some courts have ruled in contradiction to correct procedure in the field of handwriting expertise, explanation is given as to courts giving the correct ruling and arguments are developed replying to the incorrect reasoning. The paper is designed to be used as a tool in providing, where necessary, legal support for the handwriting expert's work and opinion in courts of law, particularly when provided for the prosecution in criminal cases.

KEYWORDS: Exemplars, disguise, court, handwriting, hand printing.

Introductory Remarks

The author has personally seen all the case reports included in this brief summary of relevant case law. Few of these cases are to be considered necessarily the key cases on the issues, nor are they collectively to be taken as anywhere near an exhaustive review of all relevant cases. Since the author is not an attorney, this material must be considered only as suggestions by a lay person, and it is in no way presented as authoritative. One ought to verify any case citation and any discussion of what any case might say or mean by referring to the case report itself and by consulting one's attorney. In summary, this is presented principally as a suggested starting point for beginning the research on the issues addressed.

Cases are arranged chronologically within the following sections and their sub-sections:

The entire case citation is given each time the same case is cited so that the reader need not refer to a master list. Often the exact words will be repeated under different sections and sub-sections since they apply in more than one area. The purpose of such repetition is so that, if one needs to copy a particular portion of the paper for evidential, research or other professional purpose, all relevant information is contained in the portion copied.

I. Court Ordered Exemplars as a Non-Testimonial

What seems to be the two most often cited cases on this issue are *Schmerber* [Item 7], a non-handwriting case, and *Gilbert* [Item 39], a handwriting case. Note that both cases came out of California and went to the United States Supreme Court.

A. Non-Handwriting Cases Supporting Authority to Compel Handwriting Exemplars

In Sub-section A, only a few representative cases are given, and those are ones which have been cited by handwriting cases. If all cases which treat physically identifying characteristics as non-violative of constitutional privileges were cited, the list would run into the thousands. They would treat of such common things as fingerprints and such rare subjects as judicial attention to a suspect's sneakers. Each can serve as authority that ones's handwriting, in and of itself and apart from the message it communicates, is merely a physically identifying characteristic of the person.

1. Moody v Rowell, 17 Pick (MA) 490, 28 Am Dec 317 (1835)

Though this case involved genuineness of handwriting, it did not involve compelled exemplars, nor did the ruling discussed here involve a matter of handwriting. It reiterated the rule that once a

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witness is called, he can be made to answer questions on all issues of the trial.

At page 323: "So in several recent cases, it has been held that where a witness is called to a particular fact, he is a witness to all purposes, and may be fully cross-examined to the whole case, and no distinction is made as to the mode of cross-examination [citations omitted]."

Thus this case is cited by *Commonwealth v Morgan*, which is discussed next, in support of compelling a criminal defendant, who has taken the witness stand, to submit to all relevant cross-examination just as any other witness must do.

2. Commonwealth v Morgan & Another, 107 MA 199 (1871)

Speaking of the defendant, at page 205 the Court ruled: "By taking the stand as a witness, he waived his constitutional privilege of refusing to furnish evidence against himself, and subjected himself to be treated as a witness." This case is cited as supporting the power of the court to order a witness to furnish handwriting exemplars.

3. State v Ober, 52 NH 459 (1873)

This was a prosecution "for keeping spirituous liquor for sale." Defendant, taking the stand voluntarily waived his constitutional privilege. This case is cited by later cases in support of the rule that a witness denying a writing may be made to write on cross-examination.

4. Holt v U.S., 218 US 245, 31 S Ct 2, 54 Led 1021 (1910)

Defendant was made to try on a particular blouse at the scene of the crime. This was held not to be testimonial, but only identifying, and thus not violating the Fifth Amendment. This case is cited in rulings regarding compelled handwriting exemplars.

5. Beacham v State, 162 SW2 706 (TX Cr Ap 1942)

Defendant, while in custody, was compelled to speak certain words so that a witness could identify him, which was self-incrimination and thus reversible error.

If this were the prevailing rule in all jurisdictions, it would be unconstitutional to require a suspect to write precise words and phrases. However, as the citations herein make abundantly clear, spoken or written words, as well as walk, wearing a particular garment, giving fingerprints or being photographed, and other submissions to physical identification, are not constitutionally privileged under Federal and most state rules. It seems that at least at one time Texas offered greater constitutional protection than the Federal Constitution did. This underlines the necessity to verify the specific rules for a particular state wherein one is working.

However, for later Texas rulings see *Moulton v State* (Item 17) and *Olson v State* (Item 14).

6. People v Ellis, 65 CA2 529, 55 CA Rptr 385, 421 P2 393 (1966)

For the police to require a suspect to speak for a voice identification test is not violative of the privilege against self-incrimination.

This case is cited by other cases as authority that the giving of handwriting exemplars is not testimonial and thus not privileged.

At page 394 several citations are given that self-incrimination applies to evidence of communications or testimony by defendant but not to real or physical evidence derived from him.

7. Schmerber v California, 86 Sup Ct. 1826, 384 US 757 (1966)

This case involved the drawing of blood from defendant for evidential purposes where there was probable cause for arrest for DUI.

At pages 763-764, the Court said: "It is clear that the protection of the privilege reaches an accused's communications, whatever form they might take, and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers. *Boyd v. United States,* 116 U. S. 616 [Item 35]. On the other hand, both federal and state courts have usually held that it offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture. The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling 'communications' or 'testimony,' but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it."

This case is cited by many of the handwriting cases discussed herein.

8. State v McKenna, 226 A2 757 (Essex Co. Dr. Div. NJ 1967)

Identification tests do not violate the privilege against self-incrimination.

9. Finley v Orr, Director of Dept. Of Motor Vehicles, 69 CA Rptr 137 (1968)

This case cites *People v Ellis* [Item 6] regarding the giving of physical evidence, in this case a test for blood alcohol, as not being privileged. This case, being a revocation of license by Department of Motor Vehicles for refusing to take the test when requested, was a civil hearing.

10. U.S. v Dionisio, 410 US 1, 93 Sup. Ct. 764 (1972), reversing: In re Dionisio and Smith, Witnesses before the Special February 1971 Grand Jury, Dionisio and Smit v U.S., 442 F2 276 (7 Cir 1971)

The Seventh Circuit had reversed the trial court on the basis that the Fourth Amendment required the Government to make a preliminary showing of reasonableness by affidavit filed with the court in order to compel voice exemplars.

The Supreme Court ruled that it was constitutional when defendant was ordered to give a voice exemplar in the exact words of a telephone conversation taped by the Government. The Fifth Amendment was not violated since there was no testimonial or communicative content. The Fourth Amendment was not violated since a grand jury appearance is not "seizure" and a "directive to make the voice recording infringed no valid Fourth Amendment interest." Thus there was no need for the grand jury to show reasonable cause.

11. Cramer, as District Attorney, v Tyars, 151 CA Rptr 653, 23 CA3 131, 588 P2 793 (1979)

Cites *People v Ellis* [Item 6] as to the propriety of having a witness exhibit identifying traits to the jury. Defendant, as a witness voluntarily testifying on his own behalf, had no right to refuse the request.

Though this case was not a matter of handwriting exemplars, the rule is the same for any identifying traits.

12. In re Grand Jury Proceedings (Hellman), 756 F2 428 (6 Cir 1985)

Defendant had no Fourth or Fifth Amendment right to refuse to provide verbatim voice exemplars. Handwriting exemplar cases are cited in support of this proposition. Defendant had the burden of proving that the requested exemplars had no investigative justification.

B. Privilege Against Self-Incrimination in Handwriting Exemplars.

The Fifth Amendment right of a person not to incriminate oneself is the principal constitutional issue involved in compelling handwriting exemplars, as in compelling one to submit to any kind of test for physical identification. Some states provide more protection for the individual in this regard than does the Federal Constitution. Some provided more at one time but then conformed to the less liberal Federal rule.

B-1. Privilege Against Self-Incrimination in Handwriting Exemplars: State Cases

13. Sprouse v Commonwealth, 81 VA 374 (1886)

The first count of the indictment charged forging of a check and its endorsement, "and second charged the altering of both." That would seem to indicate that he was accused of falsely altering his own forgery, the forgery of a forgery.

Defendant was asked to write "Gibson," and he misspelled the name in the same way as it was on the forged check, writing "Gipson" instead of "Gibson." "This was not compelling him to furnish evidence against himself."

14. Olson v State, 484 SW2 756 (TX Cr Ap 1969, rehearing denied 1972)

The State may give greater constitutional protection than the Federal Constitution affords. However, at page 772, the Court of Appeals ruled: "Accordingly, we hold that compelling a handwriting exemplar or sample does not constitute compelling an accused to 'give evidence against himself' in violation of Article I, § 10, of the Texas Constitution."

15. People v Stuller, 10 CA Ap3 582, 89 CA Rptr 158 (4 Dist 1970); certiorari denied, 401 US 977, 28 L Ed 2 327, 91 S Ct 1205

Headnote 2: "Taking identifying physical characteristics such as fingerprints or handwriting exemplars are outside constitutional protection against self-incrimination."

16. State v Archuleta, 82 NM 378, 482 P2 242 (Ct Ap 1971); certiorari denied, 82 NM 377, 482 P2 241 (Supreme Ct 1971)

For the court to require an accused to provide handwriting exemplars does not violate the privilege against self-incrimination.

17. Moulton v State, 486 SW2 334 (TX Cr 1971)

At page 337: "At a pretrial hearing the appellant was required by the court to make the handwriting exemplar under threat of being held in contempt if he did not do so. A handwriting exemplar in contrast to the content of what is written, like the voice or body itself, is an identifying physical characteristic outside the protection of the Fifth Amendment to the Constitution . . . and is outside the protection of Article I, Section 10 of the Constitution of this state...."

18. State v Greene, 12 NC Ap 687, 184 SE2 523 (Ct Ap 1972); appeal dismissed, 280 NC 303, 186 SE2 177

A handwriting expert identified the forged checks and the handwriting sample by defendant as being by the same writer.

At page 524: "Handwriting samples, blood samples, fingerprints, clothing, hair, voice demonstrations, even the body itself, are identifying physical characteristics and are outside the protection of the Fifth Amendment privilege against self-incrimination. [Case citations omitted.] These assignments of error are overruled."

19. People v Paine, 33 CA Ap3 1048, 109 CA Rptr 496 (1973)

Handwriting exemplars were court ordered. At page 497: "Paine, however, refused to provide exemplars and the court found him to be in contempt." Before the prosecutor could obtain a court order for them, defense counsel got from the sheriff papers on which defendant had written notes for himself during trial. The court ordered defendant's attorney to turn them over for use as exemplars. That such papers were to be used only for comparison, and not for their contents therein, did not violate the self-incrimination privilege.

20. State v Carr, 124 NJ Super 114, 304 A2 781 (1973)

At page 784: "The State's request to compel a handwriting exemplar here is permissible under both the statutory and common law exceptions to the privilege against self-incrimination."

21. People v Harris, 39 CA Ap3 965, 114 CA Rptr 892 (1974)

At page 971: "In forgery and similar prosecutions, *post litem motam* exemplars of the defendant may be used, as in this case, by the prosecution to establish an essential element of the crime charge [citations omitted]; and the taking of a defendant's handwriting specimen for this purpose does not violate his privilege against self-incrimination."

22. State v Haze, 218 KS 60, 542 P2 720 (1975)

In the *Syllabus by the Court*, a handwriting exemplar is said to be "a mere identifying physical characteristic" outside the scope of the Fifth Amendment. In item 3 of the syllabus, the court said: "When ordered by a court to supply handwriting exemplars, an accused has no constitutional or statutory right to refuse and if he does so the fact of his refusal may be admitted into evidence."

23. Commonwealth v Moss, 233 PA Super 541, 334 A2 777

(1975)

The State's provision against self-incrimination did not enlarge on the Federal Constitution, and so a defendant may be compelled to give handwriting exemplars.

24. State v Armstead, 152 GA Ap 56, 262 SE2 233 (1979)

The syllabus begins: "State took interlocutory appeal from order entered by the DeKalb Superior Court . . . denying its motion to compel defendant to produce handwriting exemplars. The Court of Appeals . . . held that to compel writing exemplar was to 'compel defendant to do an act' and was not requiring defendant to 'submit to an act,' and thus forcing defendant to produce such handwriting was not sanctioned by [the State's] Constitution, even though defendant's handwriting might have been identifying physical indicia." The Georgia Constitution offers more protection in that regard than does the federal, but no state may provide less. The Superior Court's order was affirmed.

25. People v Schmoll, 77 IL Ap3 762, 33 IL Dec 245, 396 NE2 634 (2 Dist. 1979)

The differences between the Illinois constitutional provision against self-incrimination and the Federal is "semantic rather than substantive."

26. State v Picknell, 142 VT 215, 454 A2 711 (1982)

Requiring accused to furnish handwriting exemplars does not violate the privilege against self-incrimination. The state constitutional provision is not broader than the Federal. Almost two full pages are devoted to discussion of the issue since it is one of first impression in Vermont.

At page 716, the Vermont Supreme Court said that "the liberal construction which must be placed upon constitutional provisions for the protection of personal rights would seem to require that the constitutional guaranties, however differently worded [that is, between a state constitution and the Federal Constitution on the same issue], should have as far as possible the same interpretation."

27. Re Grand Jury Investigation No. 2184-86, 219 NJ Super 90, 529 A2 1041 (1987)

Subpoenaing handwriting exemplars was not a violation of Fifth Amendment privileges.

28. State v Bertram, 591 A2 14 (RI 1991)

This was an appeal from a murder conviction which was affirmed.

At page 22: "[W]e believe that compelled production of handwriting exemplars by an accused does not violate the prohibition against self-incrimination contained in article 1, section 13, of the Rhode Island Constitution."

29. Wilson v State, 596 S2 775 (FL Ap 1992); rehearing granted 1992 FL Ap LEXIS 4117 (FL Ap), reported in full 17 FLW D936

Requiring defendant to provide handwriting exemplars would not violate his right against self-incrimination.

At page 778, the Court disagreed with the standard in *Herring v State*, which is not discussed in this paper: "There being no constitutional privilege against taking a test, such as providing a handwriting sample, it follows that there is significant probative value in a refusal to take such a test. There is no probative value, however, in exercising a constitutional right, such as the right to remain silent, because silence may be indicative of nothing other that a desire to exercise the right."

30. Hambrick v State, 204 GA Ap 668, 420 SE2 308 (1992); cert den (1992)

Headnote 5. "Defendant's submission of handwriting exemplar did not violate privilege against self-incrimination when no compulsion was involved."

On cross-examination defendant denied signing a receipt which was in dispute. Asked if he wanted to write his name, he asked how many times. No objection was made by defense counsel to this procedure. The Georgia Court of Appeals quotes *State v Armstead* [Item 24] as to the distinction between doing an act and submitting to an act. "The court had no duty . . . to prevent appellant from giving the handwriting exemplar." Also, since the exhibit on which defendant wrote his name during cross-examination was not even in existence until the conclusion of the State's case-in-chief, it did not come under the statute requiring disclosure before trial.

31. Opinion of the Justices to the Senate, 412 MA 1201, 591 NE2 1073 (1992)

Asked whether proposed legislation making refusal to take a breathalyser test admissible in evidence would be constitutional, the Justices said no. At page 1077 they stated: "Although the privilege against self-incrimination under art. 12 [of the Massachusetts Constitution] is broad, it protects only against the compulsion of communications or testimony and not against the production of real or physical evidence, such as fingerprints, photographs, lineups, blood samples, handwriting, and voice exemplars. [Citation omitted.] By contrast, testimonial evidence which reveals a person's knowledge or thoughts concerning some fact is protected."

They then went on to say that the proposed legislation would be unconstitutional in Massachusetts, though not in other jurisdictions, because a refusal is tantamount to an implied admission of having had too much to drink and because of the dilemma of either taking the test and being convicted on it, or refusing and having the refusal made evidence for conviction. However, they miss that the same argument goes for any positive act an accused must do to produce physical evidence from his person, such as handwriting exemplars. In fact, the same arguments have at times been advanced for the privilege in handwriting exemplars, but they have been uniformly rejected by the courts.

32. State v Harris, 839 SW2 54 (1992)

Headnote 35. "Fifth amendment right against self-incrimination is not violated by requiring defendant to provide handwriting samples for comparison with other evidence nor by introduction of evidence that defendant refused to take legally required test."

33. Brown v State, 92 Fulton County D R 976, 262 GA 833, 426 SE2 559 (1993)

Requiring defendant in a murder case to give a handwriting exemplar was violation of defendant's state constitutional right not to be compelled to give self-incriminating evidence. But the error was harmless since it was not used before the jury and other evidence was overwhelming.

The Court rejected the State's distinction between substantive evidence and merely establishing admissibility of appellant's statements, a distinction not supported by the Georgia constitution or *State v Armstead.* [Item 24]

34. State v Robidoux, 662 A2 268 (NH 1995)

Speaking of defendant's argument that his refusal to provide court ordered handwriting exemplars was compelling him to give testimony against himself, the New Hampshire Supreme Court stated at page 272: "If a defendant refuses to comply with the court's order, as the defendant did, such a refusal is not compelled by the State; therefore, the court may instruct the jury regarding the defendant's refusal."

B-2. Privilege Against Self-Incrimination in Handwriting Exemplars: Federal Cases

35. Boyd v U.S., 116 US 616, 6 S Ct 524, 29 L Ed 746 (Cir S.D. NY 1886)

Books and papers, and by extension exemplar writings, which are personally privileged may not be compelled. A forfeiture case, though civil in form, was penal in effect and came under the constitutional safeguard against self-incrimination. To rule that the refusal of voluntary production was tantamount to admission of the Government's assertion was the same as compulsory production.

This case was before the settled rule that handwriting exemplars, even compelled by the court, are not privileged. One must be careful when relying on reported court cases that later rulings or some statutes have not modified, or even overridden, the earlier practice.

36. U.S. v Mullaney, 32 F 370 (Cir E. D. MO 1887)

In an election fraud case, at trial defendant took the stand voluntarily and was made to write exemplars. This was upheld as not being made to incriminate himself. This case provides an excellent discussion of why compelling defendant to write names in the presence of the jury, which names he had denied writing, was proper cross-examination. The jury could be asked to examine the writings. This case is cited by *US v Euge* [Item 95].

37. Dean v U.S., 246 F 568, 158 Cir 538 (5 Cir 1917)

At page 577: The defendant's constitutional privilege of refraining from giving evidence against himself by word of mouth, or by furnishing specimens of his handwriting, is an additional reason for not construing the act of Congress so as to require a different degree or kind of proof than that ordinarily required to prove the genuineness of handwriting.

This case is definitely not the prevailing rule on the matter, since it is now clearly established that defendant does not have a constitutional privilege to refrain from providing "specimens of his handwriting" if the court orders him to.

38. U.S. ex rel. Starner v Russell, 260 FS 265 (D.C. PA 1966); reversed on other grounds, 378 F2 808 (3 Cir 1967); certiorari denied, 389 US 889, 19 L Ed 2 189, 88 S Ct 166; rehearing denied, 389 US 997, 19 L Ed 2 501, 88 S Ct 488

As reported in 260 FS, the trial court ruled that requiring the accused to provide a handwriting exemplar did not violate his privilege against self-incrimination though he was later charged with forgery.

39. Gilbert v California, 63 CA2 690, 47 CA Rptr 909, 408 P2 365, (1966); certiorari, 384 US 985, 16 L Ed2 1003, 86 S Ct 1902; remanded, 87 S Ct 1951, 18 L Ed 2 1178, 388 US 263 (1967)

The issue concerned defendant's being compelled to provide handwriting exemplars in a criminal case. Such exemplars are not testimonial, nor do they require counsel being present while they are being taken. Handwriting exemplars are not under the Fifth Amendment except as to the contents being communicative in some way.

If the exemplars taken by the government are unrepresentative, the accused can make an unlimited number for use by the government and defense handwriting experts.

This case may be the one most cited on the issue of handwriting exemplars and self-incrimination.

40. U.S. v Green, 282 FS 373 (S.D. IN 1968)

At page 374, the defense argued that in *Gilbert v California* [Item 39] defendant had given exemplars voluntarily, and, therefore, the Fifth Amendment exception did not apply in *Green* which involved compelled exemplars. In addition to the absence of an effective waiver, defendant contends that the giving of handwriting exemplars where the corpus of the crime alleged requires proof of the unlawful signatures goes considerably beyond use of a mere 'identifying physical characteristic.' Further, that in view of the scientific certainty which accompanies handwriting analysis, it is 'communicative' as to an element of the crime and is incriminating.

The District Court quoted *Schmerber* [Item 7]: To compel a person to submit to testing in which an effort will be made to determine his guilt or innocence on the basis of physiological responses, whether willed or not, is to evoke the spirit and history of the Fifth Amendment.

For a contrary ruling see *U.S. v Doe (Devlin)* [Items 82, 123, 160, 209] but distinguished in *U.S. v Irwin*, which is not discussed in this paper.

41. U.S. v Doremus, 414 F2 252 (6 Cir 1969)

Defendant was accused of posing as a Federal marshal and taking custody of his son who was a prisoner. He had an absolute right not to incriminate himself by testifying, but once he voluntarily took the stand, he had to answer all questions relevant to the issues. He was made to write the exact words written on the release which he was accused of writing in order to take custody of his son.

42. U. S. v Blount, 315 FS 1321 (E.D. LA 1970)

Compelled exemplars do not violate 5th Amendment rights.

Exemplars were needed to prove who was the maker of forged travelers checks transported in interstate commerce.

At page 1323: Since the procedure for obtaining a handwriting exemplar is benign and scientifically controlled, it would not be

violative of due process to require an additional sample when the first sample was taken in a matter before another court and the record in that case does not include a copy of the specimen."

43. U.S. v McGann and Pruitt, 431 F2 1104 (5 Cir 1970); certiorari denied, Pruitt v U.S., 401 US 919, 27 L Ed2 821, 91 S Ct 904

Requiring an accused to provide a handwriting exemplar does not violate the privilege against self-incrimination.

44. U.S. v Beshers, 437 F2 450 (9 Cir 1971)

At page 451: "[T]he proposition is settled that securing written exemplars of handwriting from an accused does not constitute a violation of his Fifth Amendment right against self-incrimination."

45. U.S. v Hamilton, 460 F2 1270 (9 Cir 1972)

The taking of defendant's handwriting exemplars does not violate the privilege against self-incrimination.

46. U.S. v Stembridge and Stembridge, 477 F2 874 (5 Cir 1973)

Headnote 1. "Introduction of evidence that defendant attempted to avoid providing a valid handwriting sample by intentionally distorting his handwriting was not improper and did not violate defendant's privilege against self-incrimination."

47. In the Matter of Braughton, Grand Jury Witness, U.S. v Braughton, 520 F2 765 (9 Cir 1975)

The order for handwriting exemplars, on its face, contains no request for testimonial content. Imprisonment for contempt in refusing to give the ordered exemplars is proper where the person does not point out where exactly in the requested exemplar is the violation of Fifth Amendment rights. Thus the court could not make a determination whether just cause existed. If the alleged violation had been pointed out, the court would have had to address it.

48. U.S. v Pheaster, U.S. v Inciso, 544 F2 353 (9 Cir 1976), 2 Fed Rules Evi Serv 593; certiorari denied, 429 US 1099, 51 L Ed 2 546, 97 S Ct 1118

It is not clear whether or not the handwriting exemplars in this case were court ordered. However, since the decision is this case was disapproved of in other cases, particularly *U.S. v Campbell* [Items 256, 220] and *U.S. v Wade*, which is not discussed in this paper, it is important to consider the consistent and convincing logic of the *Pheaster* court regarding the issue of spelling in handwriting exemplars and the Fifth Amendment privilege.

At pages 371-372 the Ninth Circuit Court of Appeals gave its statement of the question and its ruling: "Pheaster argues that the somewhat unorthodox method of obtaining and utilizing exemplars of his handwriting violated his Fifth Amendment right against self-incrimination." A federal agent testified that the normal way was to have the person copy a text, but in this case they were going after spelling, which turned out to match that in the ransom notes. "A conventional analysis was also preformed to compare the handwriting on the two sources, but the Government expert could only testify that the handwriting on the note from the kidnappers appeared to be disguised."

Defendant argued that his "case is distinguishable from *Gilbert* [Item 39] in that the handwriting exemplar in the instant case was used to show similar spelling mistakes rather than similar writing characteristics. The distinction is argued to be important, because the use of the handwriting exemplar to show spelling mistakes requires the defendant to give evidence which is 'the product of his mind and intellectual processes.' Used in such a way, the handwriting exemplar is said to pass from the realm of an 'identifying characteristic' to that of a 'communication' protected by the Fifth Amendment. In advancing this argument, Pheaster emphasizes that spelling is a skill acquired by learning.

"In our view, Pheaster has succeeded is identifying a distinction without a difference. Like spelling, penmanship is acquired by learning. The manner of spelling a word is no less an 'identifying characteristic' than the manner of crossing a 't' or looping an 'o.' All may tend to identify a defendant as the author of a writing without involving the content or message of what is written. No protected communication is involved."

49. U.S. v O'Kane, 439 FS 211 (S.D. FL 1977)

Handwriting is a public thing, and thus there is no expectation of privacy so that a request for an exemplar is not a seizure. Exemplars are not testimonial, and so the Fifth Amendment does not apply.

50. U.S. v Prewitt, 553 F2 1082 (7 Cir 1978)

Requiring accused to furnish voice or handwriting exemplars does not violate the privilege against self-incrimination, and the same goes for discovering aliases which are equally identifying.

51. In the Matter of Grand Jury Proceedings, U.S. v Antill, 579 F2 1135 (9 Cir 1978)

Requiring accused to furnish handwriting exemplars does not violate the privilege against self-incrimination.

52. U.S. v Blankney, 581 F2 1389 (10 Cir 1978)

Headnote 1. "Requiring an accused to give handwriting exemplars does not violate his Fifth Amendment privilege against self-incrimination."

The Fifth Amendment is not violated by requiring "exemplars as to checks . . . on charge of interstate transportation of a counterfeit check, even though defendant was not charged with respect to the checks for which handwriting exemplars were sought."

Since the prosecutor could charge the other checks and go to a grand jury to obtain exemplars, "it would seem generally to benefit the defendant" to do it the easy way.

53. U.S. v Shively, 715 F2 260 (7 Cir 1983); certiorari denied, 79 L Ed2 233, 1104 S Ct 1001

Disguising compelled exemplars are not testimony but an effort to prevent the Government from obtaining the physical evidence to which it is entitled. Thus the Court rejected defendant's self-incrimination argument.

54. In re Grand Jury 83-8 (MIA) Subpoena Duces Tecum Directed to Alfredo Martin and Gabriel Hernandex, 611 FS 16 (S.D. FL 1985)}

Headnote 4. "Privilege against self-incrimination does not extend to the giving of handwriting exemplars."

"For purposes of the Fifth Amendment, act of producing evidence in response to a subpoena has testimonial aspects of its own, wholly apart from the contents of the papers produced." And that "depends on the facts and circumstances of particular case or classes of cases."

55. In re Grand Jury Proceedings, 632 FS 374 (E.D. TX 1986)

Requiring accused to furnish handwriting exemplars does not violate the privilege against self-incrimination.

56. In re Mr. and Mrs. Doe, Witnesses Before the Grant Jury, Mr. and Mrs. Doe v U.S., 860 F2 40, 26 Fed Rules Evi Serv 1258 (2 Cir 1988).

Former President Marcos of the Philippines and his wife appealed a court order to provide handwriting and other exemplars.

Headnote 4. "Fifth Amendment right against self-incrimination did not bar compliance with subpoenas duces tecum seeking fingerprints, palm prints, voice and handwriting exemplars from former president of the Phillippines and his wife."

At page 46, it is described how the Marcos couple appealed to the broader protection of the Philippine Constitution against self-incrimination. It did not work. "In fact, the government concedes that handwriting exemplars are privileged under Philippine law, but disagrees that the Philippine Constitution would bar the other subpoenas. Given our conclusion that the Philippine Constitution is inapplicable, it is unnecessary and inappropriate for us to resolve this question of Philippine law."

57. U.S. v McDougal, 137 F3 547 (8 Cir 1998)

At page 559: "Requiring defendant to give handwriting exemplar and introducing samples of the defendant's handwriting at trial do not violate the Fifth Amendment privilege against self-incrimination. The handwriting itself (as opposed to the content of a written statement) is physical, not testimonial evidence." [Citations omitted.]

C. Issues of Search and Seizure in Handwriting Exemplars

In this sub-section, cases are discussed which address issues relating to search and seizure as covered by the Fourth Amendment. Some of them also address Fifth Amendment issues but were not cited in Sub-Sections B-1 or B-2 above.

58. U.S. v Long, 325 FS 583 (W.D. MO 1971), affirmed sub nomine by U.S. v Harris; overruled by U.S. v Mara

This seems to be the first case to argue that compelled handwriting exemplars are unreasonable search and seizure. The report is a carefully and well crafted decision.

It was stipulated that defendant was in state and not federal custody, that he was not a federal suspect, that he was not warned, and that, in giving a handwriting exemplar, he merely acquiesced in the request of a federal agent. The exemplar was illegal seizure under the Fourth Amendment and would be suppressed at trial. Since expert handwriting evidence was essential to prove guilt, defendant was dismissed.

59. U.S. v Praigg, 336 FS 480 (C.D. CA 1972)

The Government maintained that an arrest warrant was sufficient to go on and require handwriting exemplars. The Court said no. Nor is helpfulness for investigating crimes other than the one for which defendant is charged a sufficient reason to require the exemplars. Further, the Government must specify the exemplar wanted. The Fourth Amendment was designed to prevent, and not just redress, unlawful police action, so defendant need not furnish the exemplars before challenging the request for them. The Government came back with a proper affidavit and so obtained its order. However, later cases seem to have overruled the well considered position of the *Praigg* Court.

60. In re Riccardi, Grand Jury Impaneled November 4, 1970, 337 FS 253 (D.C. NJ 1972)

Headnote 4. "A compelled handwriting exemplar falls within the search and seizure provisions of the Fourth Amendment."

Compelled exemplars force a person to prove the body of the crime if his exemplars match the forgery.

At page 254, it is described how Riccardi offered the Government a reasonable alternative to compelled exemplars in copies of his signatures made in the ordinary course of business. The district judge noted: "I, likewise, find it difficult to draw a meaningful constitutional distinction based upon the Fifth Amendment between a coerced confession coming from an accused's mouth and one coming from his hand. Nevertheless, this Court is bound by the decisions of the United States Supreme Court and, therefore, must reject Riccardi's Fifth Amendment claim."

The District Court, therefore, went to Riccardi's Fourth Amendment claim and denied the Government's request for an order to compel handwriting exemplars since that would force the witness to provide evidence against himself. This was the first time in that particular circuit that the question of compelled handwriting exemplars as search and seizure was raised. Besides, the Government had photostatic copies of the witness' signatures which were more accurate, having been made spontaneously without motive to disguise.

61. In the Matter of the Grand Jury Impaneled March 1, 1971, 348 FS 1001 (D.C. OH 1972)

Requiring accused to furnish handwriting exemplars does not violate the privilege against self-incrimination. The Government reasonably showed a connection between requiring handwriting exemplars and the purpose to be served, thus there was no violation of the Fourth Amendment.

62. U.S. v Harris, 325 FS 583; reversed and remanded, 453 F2 1317 (8 Cir 1972) (affirming U.S. v Long sub nom.); certiorari denied, 412 US 927, 93 Sup Ct 1909 (1972)

The rulings discussed are no longer the law, having been overruled by *U.S. v Mara*.

Headnote 1: "Taking of handwriting exemplars from juvenile who was at home and from another person who was in custody constituted searches and seizures."

Headnote 5. "In order to get exemplars of suspect's writing, government must comply with standards of Fourth Amendment."

Exemplars were taken illegally where defendant was in custody and not advised of his rights until after the exemplars were taken, nor was he given an attorney when he then requested one.

At pages 1318-9, it is stated that at that time there were no Supreme Court decisions on handwriting exemplars and the Fourth Amendment, but Circuit Courts of Appeals generally followed non-handwriting decisions which indicated that a *Miranda* warning was required unless the person was not in custody and no coercion was used. The Court quotes *Haerr v U.S.*, which is not discussed in this paper: "A search implies an examination of one's premises *or person* with a view to the discovery of contraband or *evidence of guilt* to be used in prosecution of a criminal action." [Emphases in original.]

At page 1320, in discussing the idea that taking handwriting exemplars is not "intrusion beneath the body's surface" as was the issue in *Schmerber* [Item 7] where blood was taken from the suspect, the Court said: "The search is still for evidence of guilt, the evidence must be obtained from the person of the suspect himself, and it involved some intrusion into the privacy of the person which the Fourth Amendment is intended to protect." At the word "himself" there is superscript to note 1 which reads: "Of course, other handwriting exemplars might be obtained, e. g. letters, applications and the like, but admittedly these would be more difficult to evaluate than an exemplar of the forged name written by the suspect."

At page 1323, the decision speaks of *U.S. v Long* [Items 58, 62]: "We think it important to emphasize here that our decision does not mean that the Government had no right to obtain exemplars of Long's handwriting. But in order to get the evidence, it must comply with the standards of the Fourth Amendment." Note 2, still speaking of *U.S. v Long*, tells how a showing could be made to a magistrate to obtain the search warrant needed. Or he could just have been asked before arrest on the state charge. The arrest was ruled by the trial court to have been a joint state-federal arrest, and thus he was arrested by federal agents for evidential purposes, and no Fourth Amendment exception to that procedure applied.

63. U.S. v Roth, U.S. v Kephard, 466 F2 1111 (9 Cir 1972); certiorari denied, 409 US 1048, 34 L Ed2 500, 93 S Ct 540 (1972)

Requiring accused to furnish handwriting exemplars, by way of a hearing and order to comply, did not violate their Fifth Amendment rights. Finding them in contempt when they first refused and then vacating the finding when they complied was not unreasonable search and seizure. The exemplars were properly introduced at trial.

64. U.S. v Mara, a.k.a. Marasovich; certiorari granted, 406 US 956; 410 US 19, 93 S Ct 774, 35 L Ed2 99 (1973); reversing and remanding In re September 1971 Grand Jury, Mara, a/k/a Marasovich, v U.S., 454 F2 580, 10 CR L 2235 (7 Cir. 1971)

At page 21: "Handwriting, like speech, is repeatedly shown to the public, and there is no more expectation of privacy in the physical characteristics of a person's script than there is in the tone of his voice."

At page 22: "The specific and narrowly drawn directive requiring the witness to furnish a specimen of his handwriting violated no legitimate Fourth Amendment interest."

In this case the Supreme Court often referenced *U.S. v Dionisio* [Item 10] which it had just decided.

65. U.S. v Doe (Schwartz), 457 F2 895 (2 Cir 1972); stay granted, 406 US 954 (1972); certiorari denied, 410 US 941, 93 Sup Ct 1376 (1972)}

Handwriting exemplars are not testimonial.

Defendant's Fourth Amendment "probable cause" argument relative to a grand jury order for handwriting exemplars was rejected since the proper test was whether there was a reasonable expectation to privacy. At page 898: "Handwriting and voice exemplars fall on the side of the line where no reasonable expectation of privacy exists." For a contrary view see *U.S. v Harris* [Items 58, 62]. However, at page 898, it is stated that the contents of a writing, versus its identifying characteristics, are entitled to Fourth Amendment protection.

66. U.S. v McNeese, 361 FS 1100 (E.D. OK 1973)

This case states that *U.S. v Long* [Items 58, 62] and *U.S. v Harris* [Items 58, 62] no longer have effect, since they were overruled by *U.S. v Mara* [Items 58, 64, 162]. Obtaining handwriting exemplars was not a Fourth Amendment violation; but, even if it were, the government agent had complied with all requirements.

67. U.S. v Osborne et al., 482 F2 1354 (8 Cir 1973)

Headnote 4. "Defendants were not deprived of privilege against self-incrimination nor right to be free from unreasonable search and seizure by being compelled to submit handwriting exemplars."

68. U.S. v Hopkins, U.S. v Jackson, 486 F2 360 (9 Cir 1973)

Requiring accused to furnish handwriting exemplars does not violate the Fourth and Fifth Amendments.

69. In re Fernandez, In Proceedings Before a One-Man Grand Jury, 31 CT Sup 53, 321 A2 862 (1974)

Requiring a witness to furnish handwriting exemplars does not violate either Fifth or Fourth Amendment privileges.

What might appear unseemly harsh to some, nor was there a Fifth Amendment privilege "to refuse to answer whether he was member of Democratic party..."

70. U.S. v Lincoln, 494 F2 833 (9 Cir 1974)

Requiring accused to furnish handwriting exemplars does not violate Fourth or Fifth Amendment privileges. Defendant was seized pursuant to a valid border search. Handwriting is "constantly exposed" to the public, so compelling exemplars is not intrusion into privacy.

71. U.S. v Hayes et al., 388 FS 470 (W.C. PA 1975); affirmed without opinion, 521 F2 1399 (3 Cir)

Requiring accused to furnish handwriting exemplars does not violate the privileges against self-incrimination or against unreasonable search and seizure.

Headnote 10. "Court did not act improperly when it ordered that papers written by defendant while he was sitting in open court be seized for use as handwriting exemplar."

72. U.S. et al. v Campbell, a/k/a Holliday, 390 FS 711 (D.C. SD 1975); affirmed on taxpayer's appeal and remanded on the

government appeal, 524 F2 604 (8 Cir 1975)

Having been ordered by the district court to provide one exemplar, she had appealed to be required to provide none. The Internal Revenue Service (IRS) appealed on the basis that one was inadequate. Having considered both appeals, the Circuit Court ordered that "in view of the nature of the questioned documents and the testimony of handwriting expert, the taxpayer would be required to furnish ten copies of the exemplars with her right hand."

Further, it was ruled that the IRS authority to summon "other data" covers handwriting exemplars, in this case to compare to various names, dates and numbers on money orders and checks. The ordered exemplar was not violative of the Fourth Amendment.

For a contrary view from the Sixth Circuit, see *U.S. v Brown* [Items 75, 90, 226]. In *U.S. v Euge* [Item 95], the Eighth Circuit takes that contrary view, but the Supreme Court reversed the Eighth Circuit's ruling in *Euge*.

73. Paine v McCarthy, 527 F2 173 (9 Cir 1975)

Headnote 10. "Order requiring prisoner's attorney to produce papers which attorney had obtained from sheriff, which papers were sought for purpose of comparing the handwriting with that on fictitious checks, did not violate prisoner's Fourth Amendment rights." The defense attorney had obtained the papers when the district attorney sought them after defendant refused to give exemplars.

This Federal decision upheld the state court decision in *People v Paine* [Items 19, 231, 243], that handwriting exemplars do not violate federal constitutional rights. The state court rejected the defendant's objection to the limited use of the papers in question as exemplars. The papers contained notes defendant had made for himself during trial, so there was no question of an attorney/client privilege.

74. In re Palmer, Palmer v U.S., 530 F2 787 (8 Cir 1976)

A grand jury's request for handwriting exemplars is enforceable by the district court. Exemplars are not communicative and violative of the Fifth or Fourth Amendments, nor does the Government need to make a preliminary showing of reasonableness.

75. U.S. v Brown, 398 FS 444 (E.D. MI 1975); reversed in part and affirmed in part, 536 F2 117 (6 Cir 1976)

The Sixth Circuit ruled that contrary to the ruling of the Eighth Circuit Court of Appeals in *U.S. v Campbell* [Items 72, 118, 138], Congress did not give the IRS power to compel a person to produce handwriting exemplars not already in existence. The term, "other data," should be interpreted as already existing evidence similar to the specific kinds of evidence preceding it. Therefore, the order of the district court in that regard was reversed. In *U.S. v Euge* [Item 95], The U.S. Supreme Court settled the disagreement in favor of the IRS.

76. U.S. et al. v Rosinsky, 547 F2 249 (4 Cir 1977)

Since exemplars do not violate the Fourth or Fifth Amendment, "a witness under administrative summons may be compelled, subject to certain restrictions, to give handwriting exemplars."

IRS must show the court a legitimate purpose of investigation, that its inquiry is relevant to that purpose, that it does not already have the information, and that administrative steps required by statute were followed. An IRS summons is like a grand jury summons and includes the power to compel handwriting exemplars.

77. U.S. v Hollins, 811 F2 384 (7 Cir 1987)

While defendant was in custody, the grand jury subpoenaed his handwriting exemplars. The subpoena was independent of his arrest and detention. At page 387: "A handwriting exemplar is neither a search nor seizure under the Fourth Amendment.... Nor is a handwriting exemplar testimonial evidence subject to the Fifth Amendment privilege against self-incrimination." He had also given the same voluntarily.

D. Cases Addressing Other Constitutional Issues

The following cases may address Fourth and/or Fifth Amendment issues, but they cover other constitutional privileges as well. The principal issues addressed are right to counsel and right to due process, with the spousal privilege following close behind.

78. People v Graves, 64 CA2 208, 49 Cal Rptr 386, 411 P2 114 (1966)

Exemplars taken after arrest without advise of right to have counsel present were admissible since police did not elicit incriminating statements. It was not inquisitorial.

79. U.S. v Braverman, 376 F2 249 (2 Cir 1967); certiorari denied, 389 US 885, 19 L Ed 2 182, 88 S Ct 155

This was a conviction for causing transportation of counterfeit money orders in foreign commerce.

Headnote 6. "Introduction of fingerprint card, with defendant's signature on it, did not violate defendant's Fifth Amendment privilege against self-incrimination or his Sixth Amendment right to counsel."

At page 253 the Court disagrees with *Fitzsimmons v U.S.*, which is not discussed in this paper, on the issue that handwriting is more than physically identifying. In that case fingerprints were taken solely to obtain an exemplar signature. The *Fitzsimmons* Court reasoned that giving of a handwriting exemplar is an implicit communication regarding its validity and that handwriting expert evidence did not exist without the positive cooperation of accused.

80. Lewis v U.S., 127 Ap DC 269, 382 F2 817 (DC Cir 1967); certiorari denied, 389 US 962, 19 L Ed 2 377, 88 S Ct 350

Headnote 1. "The constitutional privilege against self-incrimination is not designed to isolate accused from the trial process."

Compelling a handwriting sample does not violate the Fifth Amendment and is not a communication. Accused can be compelled to write without counsel, since it would not be at a critical stage of the proceedings. At pages 818-9 the Court gave replies to the reasoning in *Fitzsimmons v U.S.*, which is not discussed in this paper.

81. Schoenbrun v U.S., 403 F2 56 (5 Cir 1968)

Ordering an accused to provide handwriting exemplars does not violate the Fifth Amendment, and it is at a non-critical stage of the

investigation which does not require advice of counsel.

82. U.S. v Doe (Devlin), 405 F2 436 (2 Cir 1968)

The Constitution's due process clause protects against the use of excessive means to obtain handwriting exemplars. Defendant would have the burden of proving that the means employed were excessive.

83. U.S. v Decker, 411 F2 306 (4 Cir 1969); certiorari denied, 396 US 969, 24 L Ed 2 435, 90 S Ct 452

Requiring accused to provide involuntary handwriting exemplars does not violate either the Fifth or Sixth Amendment, particularly since the writing of the worthless checks was not charged in a mail fraud scheme and proving their authorship by expert evidence was cumulative.

84. U.S. v Doe, 321 FS 10 (D.C. NY 1970)

Footnote 1 at page 12 addresses the argument that a split vote on the U.S. Supreme Court lessens the authority of a decision. That is definitely not so. Also at page 12, citing *Gilbert* [Item 39], the taking of exemplars before the grand jury indicts is not a critical stage of the investigation. If the exemplars which the grand jury takes are unrepresentative, additional ones could be provided at trial.

At page 13, speaking of a person forced to give physically identifying evidence under *Gilbert*, the Court says: "The rule does not depend on whether an item of evidence so developed proves to be of slight or great detriment to that person's position."

At pages 13-14: "If this item of inquiry is properly handled, it will be at its irreducible minimum and certainly for that extremely simple purpose counsel's presence would border on the ludicrous."

All in all, the Court in this case gives very enlightened rulings and directives.

85. U.S. v Izzi, 427 F2 293 (2 Cir NY 1970); certiorari denied, 399 US 928, 26 L Ed 2 794, 90 S Ct 2244

The district court ordered defendant to provide handwriting exemplars. Though the order was requested by the government only six days before trial, due process did not require postponement of the trial. The Court took notice of an obvious attempt by defendant to disguise the requested handwriting exemplars.

At page 295, the footnote says that the providing of compelled exemplars has a testimonial element of the implied statement that this is the writer's genuine writing. But *Gilbert v California* [Item 39] "represents an apparent determination that his element of testimony is insufficient to bring handwriting exemplars within the ambit of the privilege against self-incrimination."

86. U.S. v Bailey et al., 327 FS 802 (N.D. IL 1971); 332 FS 1351 (D.C. IL 1971)

All reference is to the report in 332 FS.

Motion to suppress the exemplars which were given to the grand jury was denied.

Headnote 3. "Fifth amendment does not prohibit compelling or using of handwriting exemplars, and handwriting is not a personal communication of a defendant but rather an identifying personal characteristic."

Nor is there a right to counsel during production and examination of exemplars.

Footnote 1 at page 1352 reads in part: "[N]o conceptual differences exist between any form of exemplars that deal with physical characteristics, such as voice, handwriting, and fingerprint exemplars. Nor do any of the parties so argue."

87. U.S. v Nix, 465 F2 90 (5 Cir 1972); certiorari denied, 409 U.S. 1013, 93 Sup. Ct 455 (1972)

Handwriting exemplars violate no privacy expectations nor does ordering them violate the Fifth Amendment.

88. In re Grand Jury Proceedings, Rovner, 377 FS 954 (E.D. PA 1974); affirmed mem., 500 F2 954 (3 Cir 1974); certiorari denied, 419 US 1106, 95 S Ct 776, 42 L Ed2 802 (1975)

Compelling a wife to give handwriting exemplars was not violative of the wife's marital privilege to refuse to testify against her husband. If she were defendant, providing compelled exemplars would not be self-incrimination, so at page 955 the Court said: "It is inconceivable that an act which would not make one a witness against himself would make him a witness against another."

89. State v Thomason, 538 P2 1080 (OK Cr Ap 1975)

The state's constitutional self-incrimination provision is the same as the federal, which is applied to all the states by the Fourteenth Amendment. That provision is simply against making a person a sworn witness against oneself, compelling testimonial evidence. Oklahoma cases to the contrary are now overruled, for a person can be made the source of real or physical evidence, which handwriting exemplars are.

The trial court denied the State's motion for compelled exemplars, which was error. It was not self-incrimination, which the Courts of Appeals shows by reviewing the history of the privilege. Case law shows the same thing. At page 1087: "[W]e are of the opinion that while due process would require notice and an opportunity to be heard, as well as a showing that the handwriting characteristics of a suspect or accused were relevant to a prosecution or proceeding properly before the court, the State may upon motion cause the trial court to compel him to furnish a reasonably sufficient specimen of his handwriting for comparison purposes upon penalty of contempt. However, the State need not make a preliminary showing of probable cause since a compelled handwriting exemplar is not a search and seizure within the contemplation of the Fourth Amendment...."

90. U.S. v Brown, 398 FS 444 (E.D. MI 1975); reversed in part and affirmed in part, 536 F2 117 (6 Cir 1976)

To compel defendant's former wife to write exemplars of her signature, in order to verify if returns were joint and not signed by defendant for her, was to make her a witness against the husband, who sought a court order to prevent both her testimony and exemplars. The IRS could have compelled her to produce samples of her signature already in existence and could have asked her whether or not she had signed the returns without violating the spousal privilege. This is contrary to the *Rovner* case [Item 88].

91. State v Doe, 78 WI2 161, 254 NW2 210 (1977)

Ordering the witness to provide handwriting exemplars entails no violation under the Fourth or Fifth Amendments or under the state constitution or under what the Fourteenth Amendment imposes on the states.

At page 217, the Court states that if it were deciding ab initio it would come to same conclusions as did the U. S. Supreme Court in its ruling cases. The Court then adds: "Nor would we conclude that which is habitually exposed to the public scrutiny, such as handwriting, could be the subject of a seizure violation of the Constitution of Wisconsin."

The Court surveys the ruling U.S. Supreme Court cases, which are still the ruling cases, on the issue of whether or not compelled handwriting exemplars violate constitutional privileges.

92. U.S. v Holland, 552 F2 667 (5 Cir 1977)

Taking handwriting exemplars does not violate any Fourth, Fifth or Sixth Amendment rights. The court must have jurisdiction before it can compel handwriting exemplars.

93. In re a Grand Jury Subpoena Served on Lucy Clark, 461 FS 1149 (S.D. NY 1978)

Compelling a wife to give handwriting exemplars "was not subject to being quashed on ground that it was violative of wife's marital privilege to refuse to testify against husband."

94. U.S. v Waller, 581 F2 585 (6 Cir 1978); certiorari denied, 439 US 1051, 99 S Ct 731, 58 L Ed2 711

Headnote 1. "Defendant's writings on yellow pad, seized after defendant took flight from trial, were not privileged communications, where writings were not intended as confidential communications between attorney and client and where writings were used only for comparison with signatures on checks after defendant had refused to provide police a sample of his handwriting."

Handwriting exemplars do not violate Fourth and Fifth Amendment rights.

In ordering the writing pad seized, the judge "evidenced only that he was attempting to get at truth...."

95. U.S. v Euge, 587 F2 25 (8 Cir 1978); certiorari, 441 US 942, 99 S Ct 2159, 60 L Ed2 1044; reversed, 444 US 707, 100 S Ct 874, 63 L Ed2 141 (1980); rehearing denied, 446 US 913, 100 S Ct 1845, 64 L Ed2 267

The discussion will concern the report in 63 L Ed2.

District court had ordered the defendant to produce 10 handwriting exemplars and 8 signatures. The Eighth Circuit Court of Appeals had said that the IRS was not authorized to compel them. The Supreme Court held that the IRS was authorized to compel handwriting exemplars since a witness' duty to appear and give testimony includes the duty to provide nontestimonial physical evidence.

Headnote 3. "...a summoned party must give what testimony he is capable of giving absent an exemption grounded in a substantial individual interest which outweighs the public interest in the search for truth."

Headnote 4. "Handwriting is in the nature of physical evidence which can be compelled by a grand jury in the exercise of its subpoena power."

Furthermore, handwriting exemplars are neither search and seizure under the Fourth Amendment nor are they testimonial under the Fifth Amendment. In this case the Eighth Circuit had reversed itself from *U.S. v Campbell* [Items 72, 118, 138]. The Supreme Court decision in *Euge* settled the conflicting and changing views of the various Circuit Courts of Appeals.

96. U.S. v Cotner, 657 F2 1171 (10 Cir 1981)

Requiring accused to furnish handwriting exemplars does not violate Fourth or Fifth Amendment privileges, nor is it at a critical stage of investigation requiring presence of counsel.

97. Kindred v State, 524 NE2 279 (IN 1988)

Fifth and Fourth amendment rights were not violated when defendant was required to make handwriting exemplars without assistance of counsel.

98. U.S. v Jackson, 886 F2 838, 28 Fed Rules Evi Serv 1141 (7 Cir 1989)

The Fifth Amendment applies not to the nature of the proceedings but to the nature of defendant's statement. Nor does it apply to requiring defendant to give handwriting exemplars but only to compelled communications. The Sixth Amendment right to counsel applies only to the "critical stage" of the proceedings.

100. State v Sawyers, 171 UT Adv Rep 65, 819 P2 806 (Ct Ap 1991)

A minor who was in juvenile detention asked his mother to keep an envelope, which he was expecting, away from the other children and not open it. She opened it to find LSD. Police arrested the individual identified on the return address. Defendant was ordered by the trial court to provide handwriting exemplars for comparison to the writing on the envelope.

At page 808, the Court of Appeals ruled: "Sawyers argues that his privilege against self-incrimination and unreasonable search and seizure as well as his due process right under the Utah Constitution were violated because the trial court ordered him to provide handwriting samples. We find that the trial court properly requested the samples pursuant to Utah Code...."

100. People v Clark, 5 CA4 950, 22 CA Rptr2 689, 857 P2 1099, 93 CDOS 6528, 93 Daily J DAR 11122, petition for certiorari filed (1994)

Compulsion of handwriting exemplars is permissible under the Fifth Amendment, nor is the taking of handwriting exemplars a critical stage of criminal proceedings entitling defendant to the assistance of counsel.

The tenor of the case decisions is that until a person is charged or is the specific object of suspicion, the "critical stage" of the investigation, where the right to have legal counsel present pertains, has not been reached. Once the person is charged, some courts seem to say there is a right to counsel when handwriting exemplars are required, while others seem to say not.

E. Cases Not Stating Specific Constitutional Ground

101. Smith v King, 62 CT 515, 26 A 1059 (1893)

This was a malicious prosecution brought and won by plaintiff.

Headnote 3. "...*Held*, that while the court could require plaintiff, on demand of defendant, to write or print his name with a pen, there was no foundation laid for such demand, and the court properly refused to compel plaintiff to write it." The question of fact at issue was whether plaintiff had written his name on a handkerchief found at the site of a fire.

102. Rex v Voisin, 1 KB 531, 1 ALR 1298 (Eng Ct Cr Ap 1918)

The annotation in volume 1 of American Law Reports is titled: "Admissibility in evidence, for purposes of comparison, of writing made by accused person at request of public authorities." This has value for one who wishes to do historical research on the issue of compelled handwriting exemplars. Both English and American cases are surveyed.

103. First Galesburg National Bank & Trust Co. v Federal Reserve Bank of Chicago et al., 295 IL Ap 524, 15 NE2 337 (1938)

It is allowable for the Court to require a party to write a name on cross-examination.

104. Nolan v American Telephone & Telegraph Co., 326 IL Ap 328, 61 NE2 876 (1945)

Handwriting exemplars, which the other party requests of the purported writer, are admissible.

105. Mann v State, 33 AL Ap 115, 30 S2 462 (1947), certiorari denied 249 AL 165, 30 S2 466 (1947)

It is proper to compel a witness to make handwriting exemplars on cross-examination.

106. Wesley v U.S., 384 F2 100 (9 Cir 1967)

Headnote 3. "Constitutional rights of defendant in forgery prosecution were not violated when handwriting exemplars were secured from him."

107. People v Villarino, (1970) 7 CA Ap3 56, 86 CA Rptr 338 (1970)

A witness who testified to placing a signature on a document may, on cross-examination, be made to write the same and other exemplars. The same thing holds for a witness who denies having written something. But one may not do it voluntarily or on direct examination to support one's own testimony. This is called the *post litem motam* rule.

108. State v Thompson, 256 LA 934, 240 S2 712 (1970)

The district court's order denying the state's motion to compel handwriting exemplars is "recalled and set aside and writ of mandamus issued."

At page 714: "We specifically hold here that one under arrest may be ordered to furnish handwriting exemplars to the proper officers. The use of court orders and of the court's contempt power is certainly more humane than physical coercion. While not necessarily the only method, this is a proper and legal method for compelling one under arrest to give handwriting exemplars."

109. People v Kennedy, 31 MI Ap 538, 188 NW2 140 (1971)

At page 141: "It has long been the law in Michigan that a witness may not be compelled to make handwriting samples in court for comparison purposes [citation omitted]."

This case points up the necessity, which has been mentioned, of verifying the rules prevailing in a particular state and whether there has been a later case or statute providing otherwise.

110. Hawk v Superior Court of Solano County, 42 CA Ap3 108 116 CA Rptr 713 (1974); certiorari denied, 421 US 1012, 44 L Ed2 680, 95 S Ct 2417)

At page 117: "The order compelling defendant to produce handwriting exemplars was a lawful order." Citing *Gilbert* [Item 39] and other cases.

111. In re Lopreato, 511 F2 1150 (1 Cir 1975)

Although a target of grand jury investigation, appellant's appearance before the grand jury, including giving handwriting exemplars, was not a violation of due process.

112. Christian v U.S., Moody v U.S., Clark v U.S., 394 A2 1 (DC Ap 1978)

Headnote 56: "A grand jury may subpoena a suspect in order to secure his fingerprints and handwriting exemplars."

The various cases discussed herein, which consider grand jury orders and a witness' refusal to comply, make clear that compliance is obtained by bringing the witness before the appropriate trial court in order to obtain a court order. If the witness then refuses to produce the exemplars, the refusal is contempt of court and subject to court sanctions. The grand jury itself has no enforcement powers.

113. In the Matter of the Special Federal Grand Jury Empaneled October 31, 1985, 809 F2 1023 (3 Cir 1987)

Providing the handwriting exemplars in a backhand slant as requested was not a testimonial admission that defendant would disguise his handwriting that way. He claimed that he was "compelled to provide 'normal' handwriting exemplars with a 'backward slant' when backhand is concededly not his normal writing style." The government successfully argued that changing the slant was merely manipulation of a physical ability and not testimonial.

II. Proper To Request Specific Types of Exemplars

The citations in this section will be particularly helpful to overcome an objection by a suspect or defendant to a request for particular types of exemplars or exemplars containing specific words or phrasings. The weight of court decisions are definitely on the side of the party requesting the exemplars, as long as the request can be shown to be relevant and reasonable.

For research into older cases on the propriety of compelling

handwriting exemplars, annotated case reports like the following are excellent starting points:

115. People v Hess et al., 10 CA Ap 3d 1071, 90 CA Rptr 265, 43 ALR3 643 (1970)

The annotation in volume 43 of the American Law Reports, Third Series, is titled: "Propriety of requiring accused to give handwriting exemplar," and it was authored by Erwin S. Barbre.

A. At Different speeds and With Opposite Hand

These two modes of writing exemplars, at increased speeds and with the opposite hand, are standard recommendations in the professional literature of questioned documents. The writing of various dictated exemplars at ever increasing speeds is the major method for defeating an attempt to disguise requested or compelled exemplars. The writing with the opposite hand addresses one of the primary methods of disguise in handwriting. Though the person using the opposite hand will necessarily employ all the master patterns habitually used with the normal hand, exemplars made with the opposite hand will assure against identifying the wrong person as author of a writing disguised in that way, as well as insure a cogent demonstration to the fact finder. Therefore, to have both modes solidly approved by higher courts of law can be a strong backing for the proper investigation of handwriting cases.

115. People v Klopfer, 61 CA Ap 291, 214 P 878 (1923)

At page 882 it is described how defendant, having taken the stand as a witness, was made to write an exemplar while on the witness stand, and the judge made him do it again faster. If there was any doubt in the judge's mind as to any attempt on the part of the witness to disguise his handwriting, it was the duty of the court to see that his natural and genuine handwriting was submitted to the jury.

116. Mann v State, 33 AL Ap 115, 30 S2 462 (1947); certiorari denied, 249 AL 165, 30 S2 466 (1947)

It is proper to require left hand exemplars after the expert had said that the endorsements were made with the left hand. C. D. Brooks was the handwriting expert who testified to use of the opposite hand, as compared to regular exemplars which were not made with the opposite hand.

117. U.S. v Doe, 321 FS 10 (D.C. NY 1970)

At page 13, the order is described as directing that the exemplars are to be in a "normal handwriting manner." He was to "write his and certain other names, and if the occasion warrants, to write at varying speeds each name a few times." There was no advocacy involved, merely the obtaining of samples for comparison.

118. U.S. et al. v Campbell, a/k/a Holliday, 390 FS 711 (D.C. SD 1975); affirmed, 524 F2 604 (8 Cir 1975)

In 390 FS, at page 715, the District Court stated: "The handwriting exemplars are being sought for purposes of comparison with the writing on several bank money orders and checks bearing a variety of names, dates and numbers. In order to assure a proper basis for comparison, it is reasonable to require more than a single signature. It is not unreasonable for the respondent to complete within thirty days in the presence of Special Agent Marvin, petitioner's Exhibits 11, 12, 13, 14 and 15. Each of these handwriting specimen sheets shall be completed by the respondent in her handwriting, once with her left hand and once with her right hand, in print and in longhand where the specimen sheets so direct."

119. State v Doe, 78 WI2 161, 254 NW2 210 (1977)

At pages 213-4: "He was asked to write seven times with his right hand and twice with his left the following words: 'There is an hour for every person to come to the aid of his country,' 'Mr. Douglas Cook,' and 'Chappie's Sports Centers.'

"Clearly, these penned statements were non-testimonial, and their nature confirms the state's professed purpose in securing them, that is, to use them by comparing the physical characteristics of the exemplars with questioned documents that were pertinent to the merits of the case, a purpose which the presiding judge at the John Doe found reasonable."

GB. Literatim

120. Sprouse v Commonwealth, 81 VA 374 (1886)

Defendant was asked to write "Gibson," and he misspelled the name the same as it was on the forged check, writing "Gipson" instead of "Gibson."

121. U.S. v Green, 282 FS 373 (S.D. IN 1968)

The Government had plenty of exemplars by defendant, a federal employee for some years, but requested some specifically in the wording of the questioned signature. The Court said that met an exception in *Schmerber* and would make the defendant an unwilling witness against himself.

At page 375: "For the foregoing reasons, the Government's motion to require the defendant, Joseph C. Green, to submit handwriting exemplars is hereby overruled." For contrary ruling see *U.S. v Doe (Devlin)* [Items 82, 123, 160, 209], but distinguished in *U.S. v Irwin*, which is not discussed in this paper.

122. U.S. v Vignera, 307 FS 136 (S.D. NY 1969)

Headnote 1. "An order requiring defendant to provide a hand printing exemplar tracking the words of a note given a bank teller during the course of a robbery did not violate defendant's Fifth Amendment rights."

123. U.S. v Doe (Devlin), 405 F2 436 (2 Cir 1968)

A witness was found in civil contempt for refusal to provide handwriting exemplars to the grand jury. The exemplars pretty much reproduced the actual forged instrument.

124. U.S. v Doremus, 414 F2 252 (6 Cir 1969)

Defendant was accused of posing as a federal marshal and taking custody of his son who was a federal, criminal prisoner. Defendant had an absolute right not to incriminate himself by testifying, but once he voluntarily took the stand, he had to answer all questions relevant to the issues. He was made to write the exact words written on the release which he was accused of writing and

which he used to take custody of his son.

125. U.S. v Doe (Schwartz), 457 F2 895 (2 Cir 1972); stay granted, 406 US 954 (1972); certiorari denied, 410 US 941, 93 Sup Ct 1376 (1972)}

Request for literatim exemplars is proper.

126. State v Carr, 124 NJ Super 114, 304 A2 781 (1973)

At page 784: "The form of the requested sample is proper because it seeks to elicit no information from defendant, nor does it aim to test his veracity or grammatical ability. It merely requests him to copy the wording of the sentence used on the holdup note in his own handwriting."

127. U.S. v Rothman, 463 F2 488 (2 Cir); certiorari denied, 409 US 1050, 34 L Ed2 231, 93 S Ct 455; rehearing denied, 409 US 1119, 34 L Ed2 704, 93 S Ct 455

At page 490: "Rothman was compelled to furnish a sample of his signature and also to write five additional names, all of which had appeared as endorsements on cashier's checks or as signatures on hotel registration cards."

128. U.S. v Rogers, U.S. v Spotts, 475 F2 821 (7 Cir 1973)

The Government sought compelled exemplars. Defendant refused when it came to literatim exemplars. The Government went back to court and got an order for that. Defendant gave them and made a pretrial motion to suppress, which was denied. Objection was not renewed at trial, but that did not give up the right to appeal on the issue. The exemplars were used only as standards of comparison. At page 826, concerning the argument of prejudice arising from the exemplars, the Court of Appeals said: "However, it is the trial court's duty to weigh the potential prejudice from overemphasis against the usefulness of the exemplars for handwriting analysis."

129. U.S. v Hayes et al., 388 FS 470 (W.C. PA 1975); affirmed without opinion, 521 F2 1399 (3 Cir)

Headnote 6. "No error occurred when defendant was required to furnish handwriting exemplars by copying text of incriminating letters alleged to have been written by him."

130. In re Lopreato, 511 F2 1150 (1 Cir 1975)
At 1153, the defense attorney stated in the contempt hearing that handwriting exemplars were to be in the various names signed to certain checks relating to defendant's tax liability, so the need for an affidavit from the U.S. Attorney was waived.

131. In the Matter of Grand Jury Proceedings, U.S. v Antill, 579 F2 1135 (9 Cir 1978)

The Federal Bureau of Investigation's (FBI) request for exemplars of specific phrases was clearly indicated for use as exemplars only and not as to the truth of those phrases.

132. Kindred v State, 524 NE2 279 (IN 1988)

At pages 296-297: "Defendant argues the handwriting exemplars in question were testimonial, and therefore violative of his Fifth Amendment rights, because he wrote names, things, and places dictated to him by the officer taking the exemplars. In support of his argument, defendant relies on *United States v. Campbell* (1984), 1st Cir., 732 F.2d 1017 [Items 156, 220]. However, unlike *Campbell*, we are not concerned here with an attempt to compel defendant to communicate his unique spellings.... The substantive content of the exemplars was not communicative in any sense. The exemplars were used strictly for purposes of identification of the physical characteristics of defendant's writing and comparison with the forgeries." The court could have added that the purportedly communicative content during the dictation of the exemplars came solely from the officer doing the dictation.

133. U.S. v Jacobowitz, 877 F2 162 (2 Cir 1989); certiorari denied, 107 L Ed2 141, 110 S Ct 186

Headnote 5. "Handwriting exemplars may be taken of possible aliases or other potentially incriminating names and defendant's refusal to comply may constitute circumstantial evidence of guilt."

C. Specific Style

The major style variations addressed by these various court cases are cursive versus printed. Since use of hand print is one of the principal methods of handwriting disguise, it is not surprising that there are a number of occasions when hand printed exemplars would be the bone of contention. When writing is referred to as being in "script," the case reports do not specify whether that word is being used to mean "cursive" or "manuscript" style proper. It is unfortunate that the case reports give no indication of such a fine and important distinction.

134. People v Graves, 64 CA2 208, 49 Cal Rptr 386, 411 P2 114 (1966)

The checks in question were "hand printed" while the first exemplars were in "script," so the handwriting expert said a second set of exemplars was needed.

135. U.S. v Vignera, 307 FS 136 (S.D. NY 1969)

The Government may obtain a handprinted exemplar where the exemplar it already has is insufficient since it is only in script style.

136. U.S. v Rudy, 429 F2 993 (9 Cir 1970)

The District Court ordered the hand printing of the alphabet in the English language to be sufficient in quantity for an expert analysis. Defendant refused, thus the contempt finding. He contended that handprinting was subject to erroneous identification.

At page 994, the Court said: "We hold that handprinting is within the handwriting rule of *Gilbert*" [Item 39] At trial, questions either of exemplars being unrepresentative or of their not being subject to identification could be litigated.

137. U.S. v Roth, U.S. v Kephard, 466 F2 1111 (9 Cir 1972); certiorari denied, 409 US 1048, 34 L Ed2 500, 93 S Ct 540 (1972)

At page 1114: "After indictment, the government moved for an order compelling the execution of handwriting and handprinting

exemplars by each defendant." The order was granted and upheld as proper.

138. U.S. et al. v Campbell, a/k/a Holliday, 390 FS 711 (D.C. SD 1975); affirmed, 524 F2 604 (8 Cir 1975)

In 524 F2, at page 608: "The government appeals from that part of the order requiring the taxpayer to complete only one copy of the requested handwriting in print and in longhand, once with her left hand and once with her right hand. The government had requested ten copies. Its expert had testified that ten copies were needed for adequate comparison." The Government's appeal was granted, but it dropped the need for left hand samples.

139. U.S. et al. v Rosinsky, 547 F2 249 (4 Cir 1977)

Samples of defendant's handwriting which the IRS already had were not block printing or in the exact words appearing on the questioned checks and invoices. The request for such was granted and the request upheld.

140. In re Layden, a Witness before the Special February 1977 Grand Jury, 446 FS 53 (N.D. IL 1978)

Compelling convoluted handwriting exemplars violates Fourth and Fifth Amendment rights. *Special Federal Grand Jury,* 809 F2 1027 [Items 113, 144, 174, 205], criticizes the *Layden* Court's reasoning.

At page 55, after having said that the Fifth Amendment is not offended by handwriting exemplars which would also aid the grand jury "in discovering any possible relationship between documents now in question and the witness," it is reported that "The Government asserts that this is so even though no similarities have been found in the questioned documents and the witness' normal script."

At page 56, the Court described its dilemma: "In the case before me, the Government asks that I go beyond these cases to require the witness here to display an unnatural [for him] physical characteristic. It is elementary that I would be compelling him to 'act-out'." And later: "After a determination by the Government's expert that the witness' normal script bears no commonality to signatures appearing on documents here in question, the Government has sought an order to force the witness to write in such a convoluted manner that the writing might compare favorably to that found in the questioned documents. Such a contrived handwriting sample decidedly would not be 'natural' for this witness. And the Government has not been able to demonstrate that there is anything more than a mere chance possibility that the contrived exemplar would match with the documents under investigation." The Court then stated the technical difficulty: "[A]re either handwriting or voice samples so certain of identification that they may be equated with a person's physical qualities of height, weight, hair color, age, sex, and so forth? Probably not, although *Dionisio* [Item 10] and *Mara* [Items 58, 64, 162] decided otherwise. To conclude with absolute certainty that a contrived handwriting sample is or is not that of a particular person is virtually impossible."

The Court summarized the dilemma for the witness at page 57: "There here is a 'Catch 22' operating. The more 'successful' the witness tries to imitate the questioned handwriting, the more likely he is to implicate himself; and the less 'successful' his attempts proved to be the more he exposes himself to the charge that he is intentionally disobeying the court's order. He is presented with a true Hobson's choice. Exposure of a witness to such uncertainty in the force of law is inequitable, unreasonable, and offensive to basic concepts of fundamental fairness."

It is submitted that the *Layden* Court's reasoning is sound and logical. If the handwriting expert finds no commonality between a person's regular style of writing and the "convoluted" writing in question, then that itself is at least probable proof that such person is not the writer, since it is virtually impossible to suppress all of one's identifying characteristics in any disguise, particularly in an extended writing. There certainly would be no reasonable grounds of suspicion from the viewpoint of handwriting expertise in such a case, and it seems that at least a minimal showing of both relevancy and reasonableness should be required for a court order to compel handwriting exemplars.

141. U.S. v Clifford, 543 FS 424, 10 Fed Rules Evi Serv 1424 (WD PA 1982); reversed on other grounds, 704 F2 86, 12 Fed Rules Evi Serv 870 (3 Cir 1983)

The prosecution had obtained printed exemplars to compare to the printed anonymous notes. Then it obtained purported cursive writings by defendant, and wanted cursive exemplars to determine his authorship of the cursive writings. After that, the linguistic analysis would compare the cursive writings to printed notes to determine authorship. The trial court denied the motion for cursive exemplars because linguistics was not advanced enough to be reliable. The FBI report had said that linguistic analysis was for investigative purposes only and not for testimony.

On appeal as reported in 704 F2 86, it was ruled that the linguistic evidence could have gone to the jury, thus overruling the experts themselves on the evidential reliability of linguistics, which seems a bit rash. At page 91 it is stated that there is no reason why the district judge should not grant the request for cursive exemplars if the Government renews it on remand.

142. U.S. v Richardson, 755 F2 685 (8 Cir 1985)

Defendant's Fourth and Fifth Amendment rights were not violated by compelled backhand exemplars, which were unlike her natural handwriting.

143. Huhn v State, 511 S2 583 (FL Ap 1987)

At page 586 it is described how expert Carl Lord took handwriting exemplars from the defendant, who printed and wrote slowly contrary to the request to use cursive.

144. In the Matter of the Special Federal Grand Jury Empaneled October 31, 1985, 809 F2 1023 (3 Cir 1987)

A witness at a grand jury hearing was "compelled to provide 'normal' handwriting exemplars with a 'backward slant' when backhand is concededly not his normal writing style."

At page 1026, speaking of defendant's argument: "As we understand the argument, it is that compulsion to *choose* a 'normal' style which is concededly not his customary style is tantamount to compelling an admission that it is normal for him to disguise his writing in the demonstrated manner." [Emphasis in original.] The court reasoned that "the meaning of the word 'normal' could only be that the sample should be uncontrived except insofar as directed..... The potential [of identifying a writer] exists to the same degree

whether the sample is backhand or forehand."

At page 1027, the reasoning in *In re Layden* [Item 140] is criticized, but its reasoning is hardly given fair expression. Nevertheless, the weight of cases is that disguised handwriting comes under the concept that handwriting is a publicly displayed physical characteristic, although it is hard even to imagine that anyone would normally go around publicly displaying disguised handwriting.

145. State v Harris, 839 SW2 54 (1992)

At page 70: "The proof shows that, after giving some handwriting samples, in defiance of a court order, the Defendant refused to give additional samples when Vastrick requested more examples of lower-case letters written by the Defendant."

D. Other Factors Considered

In this sub-section other factors, such as the number of exemplars and the time differential between questioned and exemplar writings, come into play. Factors mentioned above in Sub-sections A, B and C may also be included.

146. Citizens' Bank & Trust Co. of Middlesboro v Allen, 43 F2 549 (4 Cir VA 1930)

At page 551: "The second question, raised by proper exception and assignment, is to the action of the trial court, after Mrs. Allen had written her name at the request and in the presence of the court and counsel rapidly a number of times with a number of different pen points, and afterwards in her usual regular, and undisturbed way of writing, and again in the presence of the jury a number of times, in permitting the paper on which her signatures thus appeared to be exhibited to the jury for comparison." The Court of Appeals rejected this assignment of error by defendant. Nor do handwriting exemplars written by a party on the witness stand at order of the court come under the exclusion of the *post litem motam* rule.

147. First Galesburg National Bank & Trust Co. v Federal Reserve Bank of Chicago et al., 295 IL Ap 524, 15 NE2 337 (1938)

At page 344, the court ruled that eight exemplar signatures were enough so that it was not error for the court not to require the witness to write more exemplars on cross-examination. Circumstances between the alleged time of signing two years previously and signing in court while on the witness stand "were entirely different."

148. Lewis v U.S., 127 Ap DC 269, 382 F2 817 (DC Cir 1967); certiorari denied, 389 US 962, 19 L Ed 2 377, 88 S Ct 350

Headnote 3. "Even if accused were coerced to write full confession, random words thereof could be used as example of his handwriting, provided jury did not learn they were from a confession."

At page 818: "An exemplar is relevant only for the shape and direction of some lines and marks which may identify the writer, as fingerprints and photographs do. Words can be used as physical evidence, apart from their communicative content...."

149. In re Grand Jury Proceedings (Schofield), 486 F2 85 (3 Cir 1973) (Schofield I)

In the Third Circuit the law is that the government must make a preliminary showing in an affidavit that the handwriting exemplars to be taken are relevant, properly within grand jury's jurisdiction and not sought primarily for another purpose. The affidavit should be disclosed to the witness. The basic reason for this rule is given at page 93: "The Government wants only handwriting exemplars, fingerprints and a mug shot. It has no general right to any of these things."

150. State v Thomason, 538 P2 1080 (OK Cr Ap 1975)

In reversing the trial court's refusal of the State's request for handwriting exemplars, the Court of Criminal Appeals said at page 1087: "While unjustified compulsion to provide irrelevant handwriting exemplars would in our opinion by violative of due process, we are of the opinion that the State advanced a reasonable explanation why that sampling within its possession [signatures on two fingerprint cards] was insufficient for comparative purposes, and that the right to probe this area for evidence necessarily grants the State the authority to sufficiently do so for the reasonable advancement of legitimate investigative interests. We therefore hold that the trial court erred...."

151. In re Grand Jury Proceeding, (Schofield), 507 F2 963 (3 Cir 1975) (Schofield II); certiorari denied, 421 U.S. 1015, 95 Sup. Ct. 2424 (1975)

At page 963: "Grand jury witness who had previously testified after being granted immunity refused to comply with subsequent subpoena directing her to permit photographs, fingerprints and handwriting exemplars to be taken." The need was to determine whether she had perjured herself in earlier grand jury testimony.

She was advised that she was a potential defendant and that the exemplars would be used solely as standards of comparison. Taking handwriting exemplars should be relevant to proper grand jury proceedings, within the jury's jurisdiction and intended for no other purposes. Then contempt proceedings would be justified.

Schofield I [Items 149, 165, 182] had not required a showing of either reasonableness or probable cause.

152. In re Grand Jury Investigation, U.S. v McLean, 565 F2 318 (5 Cir 1977)

At the hearing, the government said that McLean was a potential defendant, but would be granted immunity when testifying before the grand jury but not before giving exemplars, which would then not be immunized. The sentence for the exemplar contained all the letters of the alphabet, and her signature was to be written on ten sheets of paper. She refused and asked that *Schofield I and II* [Items 149, 151, 165, 182] be adopted. The finding of civil contempt was affirmed.

153. In re Liberatore, 574 F2 78 (2 Cir 1978)

Although the government could have had other exemplars, those on its standard form would make for better analysis.

154. Watkins v State, 151 GA Ap 510, 260 SW2 547 (1979)

It was permissible to use forged checks from an earlier

conviction, although apparently against the rule forbidding use of prior conviction or behavior as evidence, since they were admissible as admitted writings for comparison. The expert said he needed a combination of various things to make an identification. The state had a right to make its case.

155. State v Mitchell, 226 KS 776, 602 P2 1383 (1979)

The handwriting expert determined that the writings by defendant which were on hand were not sufficient for a definite identification of defendant as author of the handwriting found at the scene of a burglary. The expert said that at least two pages more were needed. The court order to that effect was upheld on appeal.

156. U.S. v Campbell, 732 F2 1017 (1 Cir 1984)

This case is in part at variance with the dominant rulings, and in places the Court's logic could be a bit more logical. For that reason, discussion of it will be at a greater length than for most other cases.

At page 1021: "The only difference we see between dictation and being shown the words to write would be to discover defendant's choice of spelling." The district court's order had said to do it by dictation. Defendant refused to write without seeing the text and was thus found in contempt. The refusal was brought up at trial. The First Circuit rejected the argument of *U.S. v Pheaster* [Item 48]: "The *Pheaster* court got off on the wrong foot. Basic penmanship, of course, is learned, but to say that the ultimate handwriting is an intellectual process of learning, as distinguished from physical form, is simply not so.... When he writes a dictated word, the writer is saying, 'This is how I spell it,'--a testimonial message in addition to a physical display."

Concerning that logic, one could say that the same argument goes for the entire exemplar and each and every one of its features. Further, during the very act of writing, established habits of spelling are no more deliberate, mentally-adverted-to acts than are established habits of letter formations.

Then the Court went on to say: "Not surprisingly, the [trial] court cited no authority for its position." However, there is a body of case law which specifically upholds the propriety of using uniquely individual spelling habits as legitimately identifying, some of such cases being discussed in this paper. For example, see *Sprouse v Commonwealth* [Items 13, 120], though one could write an extensive paper on court cases supporting the use of spelling habits to identify a writer Then, noting that the procedure ordered by the trial court would be the same as putting defendant on the witness stand and giving him a spelling test, the First Circuit Court of Appeals said: "At the same time, it [the Government] did not deny that it had a probation file containing defendant's handwriting, both recent and old. We are not surprised that he suspected the government of wanting something more than handwriting." The spelling test concept is analogously true of all forced identification procedures, such as put him on the stand and "test" him on penmanship, pronunciation, gait, manner of wearing an article of clothing, etc.

At page 1021, speaking about physically identifying characteristics of handwriting, the Court said: "Indeed, it is the stock in trade of handwriting experts that some characteristics are so personally entrenched that disguise is almost impossible. *See* Harrison, Suspect Documents, (1958) 292, 349-51."

At page 1022, on rehearing the Court effectively demonstrated its persistent misunderstanding while almost, nevertheless, giving the Government what it wanted. Dictated exemplars have a good purpose such as "reduce conscious manipulation." But spelling remains "an intellectual process." However, it might be countered that we rarely spell words in writing other than by second nature, just as we rarely write them other than by second nature. To counter its perceived danger, the Court of Appeals directed that the jury would be instructed to ignore misspellings, though comment could be made on further refusal to give exemplars.

Because of the problem this ruling can cause when standard, traditional methods of taking exemplars by dictation is employed, the following case is inserted although it is out of chronological order and did not involve court ordered exemplars.

157. U.S. v Matos, 990 FS 141 (E.D. NY 1998)

The District Court said that generally a claim of the Fifth Amendment privilege must be made at the time exemplars are given to preserve later motions regarding such exemplars. The grand jury was investigating a series of bank robberies and subpoenaed defendant to provide handwriting exemplars. Since defendant accepted the convenient alternative of providing the exemplars at the office of the FBI agent, where he did not elect to have an attorney present when told he could and did not claim his Fifth Amendment privilege at the time. Some of the exemplars were taken by dictation. Defendant moved that the dictated exemplars be excluded from trial, since they elicited his manner of spelling, a violation of the Fifth. In this case "drawers" was spelled "draws" both in one of the bank hold-up notes and in defendant's dictated exemplars.

The district judge followed the reasoning in *Wade* [which is not discussed in this paper] and *Campbell* [Items 156, 220] and disagreed with that in *Pheaster* [Item 48]. At page 144 it is stated: "If the subpoena had called for the defendant's testimony before the grand jury, and the first question to him had been: 'How do you spell "drawers"?,' the government would be hard-pressed to argue, in response to an assertion of the privilege with respect to that question, that the answer would not constitute testimony. The provision of that information by writing out dictated words does no render it any less testimonial."

However, one could counter that the very same question could be asked about any of the physically identifying characteristic which courts have ruled to be outside of the protection of the Fifth Amendment. The information sought in defendant's sworn answer would be equally impermissible, while the mere taking of the same information would be admissible. For example, one might ask: "How do you form your letters when writing the word 'drawers'?" To compel defendant's description of the act would be violative of the privilege, while compelling him to do the act and observing how he did it would not be. The same goes for asking how he wears his hat versus having him wear it for witnesses to observe, and for each comparable kind of identifying characteristic.

158. Re Grand Jury Investigation No. 2184-86, 219 NJ Super 90, 529 A2 1041 (1987)

A subpoena for 2400 exemplars was unreasonable. The suspect was permitted to comply by providing 100. Reasonableness in subpoenaing exemplars requires (1) that there be a proper purpose and authorization, (2) that the exemplars be relevant and (3) that the request be adequate and not excessive.

III. Contempt of Court and Obstruction of Justice

If there is willful refusal to comply with the court order in any way, there are grounds for a finding of contempt of court and/or obstruction of justice.

A. Contempt of Court Specifically

159. Lewis v U.S., 127 Ap DC 269, 382 F2 817 (DC Cir 1967); certiorari denied, 389 US 962, 19 L Ed 2 377, 88 S Ct 350

Headnote 8. "A sample of defendant's handwriting could have been compelled on pain of contempt at any stage after he was before the court."

160. U.S. v Doe (Devlin), 405 F2 436 (2 Cir 1968)

Upon refusal to provide the ordered handwriting exemplars, the lower court made a finding of civil contempt with 30 days imprisonment. This was upheld upon appeal.

161. U.S. v Rudy, 429 F2 993 (9 Cir 1970)

A criminal contempt sentence was upheld when defendant refused to furnish court ordered hand printing exemplars to compare to a kidnap ransom note. No exemplars were found in a lawful search of defendant's person or apartment, so there was a need. He was not accused of involvement in the abduction itself.

The Court ordered the hand printing of the alphabet in the English language sufficient in quantity for an expert analysis. Defendant refused, thus the contempt finding.

162. U.S. v Mara, a.k.a. Marasovich; certiorari granted, 406 US 956; 410 US 19, 93 S Ct 774, 35 L Ed2 99 (1973); reversing and remanding Mara v U.S., 454 F2 580 (7 Cir. 1971)

Mara twice refused to provide handwriting and printing exemplars requested by the grand jury. The district court ordered the exemplars, finding contempt and jailing Mara upon refusal. The Court of Appeals reversed the district court on the basis of unreasonable search and seizure, while the Supreme Court upheld the district court's ruling.

163. U.S. v Roth, U.S. v Kephard, 466 F2 1111 (9 Cir 1972); certiorari denied, 409 US 1048, 34 L Ed2 500, 93 S Ct 540 (1972)

At page 1114: "After indictment, the government moved for an order compelling the execution of handwriting and handprinting exemplars by each defendant." The motion was granted but defendants refused to comply. They were found in contempt, which was vacated after they gave the exemplars.

164. U.S. v Stembridge and Stembridge, 477 F2 874 (5 Cir 1973)

To permit a defendant to disguise a court ordered exemplar is the same as permitting refusal.

165. In re Grand Jury Proceedings (Schofield), 486 F2 85 (3 Cir 1973) (Schofield I)

At page 87, Schofield was subpoenaed to testify but, when there, was asked not to testify but to give handwriting exemplars and be photographed and fingerprinted. She asked time to consult an attorney, and, having done so, refused to comply. A court order was obtained, and she refused again and was found in contempt. She contended that she should be told the purpose of the exemplars and shown the documents in question, which was refused. At page 88 begins an extended discussion of what "contempt" means.

166. Hawk v Superior Court of Solano County, 42 CA Ap3 108 116 CA Rptr 713 (1974); certiorari denied, 421 US 1012, 44 L Ed2 680, 95 S Ct 2417

The attorney for Juan Corona, who was accused of murdering several farm workers, was found in contempt for, among other things, saying in open court that he had advised his client to disobey a legitimate court order by not giving handwriting exemplars. Corona was separately found in contempt for his refusal.

167. U.S. v Hawkins, 501 F2 1029 (9 Cir 1974); certiorari denied, 107 L Ed2 141, 110 S Ct 186

A finding of civil contempt citation for a second refusal of compelled handwriting exemplars, one year after a finding of criminal contempt for a first refusal, was not double jeopardy.

168. In the Matter of Braughton, Grand Jury Witness, U.S. v Braughton, 520 F2 765 (9 Cir 1975)

An order for handwriting exemplars on its face contains no request for testimonial content. Imprisonment for contempt in refusing to give the ordered exemplars is proper where a person does not point out where exactly is the violation of Fifth Amendment rights. Thus the court could not make a determination whether just cause existed.

169. State v Doe, 78 WI2 161, 254 NW2 210 (1977)

Witness Doe was found in contempt and sentenced to 60 days in the county jail for refusal to provide court ordered handwriting exemplars in the John Doe proceeding.

170. U.S. v O'Kane, 439 FS 211 (S.D. FL 1977)

It was the grand jury, and not the Assistant U.S. Attorney, which had authority to order witnesses to provide handwriting exemplars, and, absent the grand jury's order, the district court cannot order exemplars. At page 214: "Should a witness raise a nonconstitutional defense in opposition to a grand jury directive to provide nontestamentary evidence, the district court's duty to prevent abuse of the grand jury process would be triggered by a motion to compel that evidence." The compelling would be by a finding of contempt of court for a refusal.

171. In re Liberatore, 574 F2 78 (2 Cir 1978)

A civil contempt conviction was upheld for a refusal to provide court ordered handwriting exemplars in a grand jury proceeding. The Government is not required to make a preliminary showing of

necessity, or that it does not already have the material, or that less coercive means are not available, or of the relevancy of the exemplars.

172. People v Schmoll, 77 IL Ap3 762, 33 IL Dec 245, 396 NE2 634 (2 Dist. 1979)

Being held in custody for six months until proper exemplars were provided was for civil contempt, not criminal, and defendant was not entitled to a trial. Defendant was brought into court every thirty days so that he could discharge the contempt, but he repeatedly refused to comply or would not comply properly.

173. Baranko v State, 406 S2 1271 (FL Ap 1981); dismissed without opinion, 412 S2 463 (1982)

Headnote 2. "Contempt is proper remedy for enforcement of discovery." At page 1272, the Court notes that it was not the only remedy since the appellant was already in jail.

174. In the Matter of the Special Federal Grand Jury Empaneled October 31, 1985, 809 F2 1023 (3 Cir 1987)

Defendant's contempt conviction for refusing to provide a back-slant exemplar was upheld, since the Fifth Amendment does not cover physically identifying features such as handwriting.

B. Obstruction of Justice

Black's Law Dictionary defines "obstructing justice" as "impeding or obstructing those who seek justice in a court, or those who have duties or powers of administering justice therein." The following case citations will focus solely on how a deliberate disguise of court ordered handwriting exemplars is obstruction of justice. However, it is suggested that all those who offer forged documents in any court proceeding are obstructing justice, such as those putting forth a fraudulent will in a probate case, thus obstructing other claimants to the estate of a decedent from obtaining their just inheritance.

175. Elliott v U.S., 385 A2 183 (DC Ap 1978)

The second twin brother posed as the first one who had been ordered to provide handwriting exemplars. The second twin gave the court ordered handwriting exemplars in place of his brother and was convicted of obstruction of justice for doing so. The conviction was upheld by the District of Columbia Court of Appeals. The first brother had no choice in the matter of providing exemplars, and he himself was later proven to have signed documents relating to stolen credit cards.

One wonders if they got to share a jail cell.

176. U.S. v Oberhellmann, 748 FS 1344; reversed, 946 F2 50 (7 Cir 1991)

Conviction for forging another attorney's name to a withdrawal from a case was reversed since it was not proved beyond a reasonable doubt that it obstructed justice. However, the Court of Appeals speaks sternly of both attorneys' behavior, since the one, whose name was forged by the other, improperly took the file out of the law office from which he had been fired and proceeded to settle the case. The Court said that they might be prosecuted under other provisions of law, and the Court sent its opinion to the state bar to take a close look at both attorneys' actions. The Court did not say that the forgery was not obstruction of justice, only that the degree of certainty of the proof was insufficient for a criminal conviction.

By extension, one might argue that any false writing to mislead a police investigation or a court inquiry might be obstruction of justice. For example, in anonymous writing cases this might embrace an anonymous writing represented as coming from another, making that other appear to be guilty of a crime of which such other is innocent, and so wilfully misleading law enforcement and the courts in their inquiries and findings.

177. U.S. v Valdez et al., 16 F3 1324 (2 Cir 1994)

It is obstruction of justice to disguise handwriting exemplars, thus making handwriting comparison more difficult. The questioned documents were illicit drug records. At page 1135: "In any event, there are few better examples of a classic obstruction of justice than a defendant who refuses to give handwriting samples when compelled by a subpoena. His disguise of his handwriting made difficult the comparison of his writing with that in the drug transactions notebook seized by the government, thus hindering the government in its investigation."

C. Resistance to the Order: Valid Grounds

The person ordered to provide the handwriting exemplars has the right to resist the order, if there are valid grounds for doing so and the court can be convinced of that. This sub-section will look at cases where the person successfully resisted the order. The following sub-section will look at cases where either the grounds asserted for resistance were invalid or the proof was insufficient, though the grounds asserted might have been valid if properly proven.

178. State v Shade, 119 WV 600, 195 SE 338 (1938)

Where a statute requires that request exemplars be made in the presence of the judge, it is a judge of a court of record, not a justice of the peace, who must supervise the process. The exemplar made before the justice of the peace was introduced at trial in a court of record, constituting prejudicial error.

The trial judge asked the prosecutor: "What evidence have you that the defendant forged Robert Morrow's name?" The West Virginia Supreme Court gave this evaluation: "The question by the court sufficiently indicates that evidence of the forgery, if any, theretofore introduced was not at all impressive." Subsequent introduction of the exemplar, which had been made before the justice of the peace, secured the conviction which was overturned for that reason.

A later case noted that this West Virginia provision was deleted in 1981. However, the point is that courts and law enforcement must abide by any relevant statutes.

179. People v Matteson, 36 CA Rptr 373 (2 Dist Ap 1964); vacated and reversed, 61 CA2 466, 39 CA Rptr 1, 393 P2 161 (1964)

The report in 393 P2, at page 163, reads: "Evidence obtained by the state from a defendant by brutality is not admissible against him. (Rochin v California, 342 US 165, 173, 72 S Ct 205, 96 L Ed 183.) It is irrelevant that a handwriting exemplar does not fall

within the privilege against self-incrimination; the rule of the Rochin case is a rule of exclusion, and the fact that the evidence does not fall within other exclusionary rules does not save it."

180. U.S. v Bailey et al., 327 FS 802 (N.D. IL 1971), 332 FS 1351 (N.D. IL 1971)

All reference is to the report in 332 FS.

The grand jury should have reasonable grounds for requiring handwriting exemplars, since it is equated with law enforcement in that regard. But the case, *In re Dionisio* [Item 10], establishing that rule was made after this event and should not be applied retroactively.

At page 1354 it is stated that, if the rule of dragnet investigations is not applied to grand juries, police would only need to have the grand jury tell them to do what they cannot do on their own. Grand juries have a dual function, both to investigate and to act as a bulwark for the innocent "against hasty, malicious and oppressive prosecution and persecution."

182. U.S. v Cassell et al., 452 F2 533 (7 Cir 1971)

Because defendant had not been given a proper Miranda Warning concerning right to counsel during interrogation, his admissions during such interrogation were inadmissible and the handwriting exemplar obtained at the same time was also inadmissible as "fruit of the poisonous tree."

182. In re Grand Jury Proceedings (Schofield), 486 F2 85 (3 Cir 1973) (Schofield I)

At page 91 begins a list of the reasons one can raise for resisting a grand jury subpoena, with case citations. It is not contempt until a judge backs up the grand jury order with a court order, and so the contempt is of the court not of the grand jury.

183. U.S. v Hayes et al., 388 FS 470 (W.C. PA 1975); affirmed without opinion, 521 F2 1399 (3 Cir)

At pages 474-5, it is described how the papers seized in the courtroom were sealed and later given to defense counsel to make claim of self-incrimination or attorney-client privilege, which he did on three of the four sheets. The fourth sheet went to the prosecutor for the sole purpose of comparison.

184. In re Proceedings to Enforce Grand Jury Subpoenas, 430 FS 1071 (E.D. PA 1977)

Witnesses could defend against contempt proceedings for refusing to give ordered handwriting exemplars on basis that the order resulted from illegal wiretapping. They would then have the right to inspect applications, affidavits, etc., which the office of the Attorney General used in the matter.

185. U.S. v O'Kane, 439 FS 211 (S.D. FL 1977)

A witness has a right to refuse handwriting exemplars to the grand jury and have a judge decide the issue. Such a right "is not a hollow one."

Where the Assistant U.S. Attorney obtained handwriting exemplars by telling witnesses to give the exemplars voluntarily or they would be subject to court order and contempt, the exemplars were not voluntary. Further, they had not been advised of any rights in the matter.

186. U.S. v Holland, 552 F2 667 (5 Cir 1977)

Defendant successfully argued that the federal district court must have jurisdiction before it can compel handwriting exemplars, and that it did not in this case. Thus its finding him in contempt and imposing a jail sentence were improper.

187. U.S. v LaSalle National Bank, 554 F2 302; reversed and remanded, 57 L Ed2 221 (1977)

The intent of a single agent acting for the sole purpose of finding criminal evidence does not restrict the agency's enforcement policy. The agency must show its good faith by demonstrating (1) that it has a legitimate purpose in investigating, (2) that its inquiry is relevant to the purpose, (3) that it does not have the information sought, and (4) that proper administrative steps have been followed.

IRS can summon production of private papers only to (1) ascertain the correctness of any return, (2) make a return where none has been made, (3) determine tax liability, or (4) collect the liability.

188. In re Grand Jury Investigation, U.S. v McLean, 565 F2 318 (5 Cir 1977)

In order to provide handwriting exemplars to the grand jury, "absent allegations of harassment of a witness or prosecutorial misuse of the system, the Government was not required to make a preliminary showing justifying the requested evidence." The district court ruled, and the Court of Appeals affirmed, that the Government had made its showing and an affidavit was not required.

189. Sanchez v Attorney General, 93 NM 210, 598 P2 1170 (Ct Ap 1979)

Appellant successfully appealed from an order of the court "directing him to provide handwriting exemplars. The Court of Appeals . . . held that: (1) defendant's physical presence in District Court did not validate Court's order; (2) requirements for issuance of search warrant were not met such as to authorize such order; (3) rules of criminal procedure did not authorize such order in that criminal proceedings did not exist at that point; and (4) authority for such order did not exist under constitutional grant of 'original jurisdiction.'" The District Court did not have authority, in either statute or rule or under the state constitution, to order defendant to provide the exemplars or be held in contempt.

190. In re Grand Jury Subpoena served upon Yaasmyn Fula, 558 FS 50 (S.D. NY 1983)

The first contempt order was vacated on appeal, 672 F2 279 (2 Cir 1982), on basis that the hearing which found Fula in contempt had not been open to the public. 558 FS 50 is the report of the second contempt order, where the mistake was not repeated.

D. Resistance to the Order: Invalid Grounds

In the following cases the appellant either asserted an invalid basis for resistance or failed to prove what could have been a valid basis.

191. Mitchell v Mitchell, 24 WA2 701, 166 P2 938 (1946)

In a divorce action the husband, respondent, accused the wife, appellant, of having written a certain document, which she denied.

At page 940: "The trial court asked appellant and respondent to give it specimens of their handwriting and, without objection of any kind, both complied. Appellant contends that, in taking and using these specimen writings, the court, in effect, improperly acted as an expert handwriting witness.

"We do not think so...."

In federal courts, and in many state courts, the trier of fact may make a comparison of handwriting. Taking all parties' exemplars (in this case but two) was an excellent idea which should be standard practice. It is routine for handwriting experts, particularly in anonymous letter cases, to require handwriting from all potential suspects, no matter how unlikely the clients might think any given suspect might be. If the experts do this, how much more ought the non-experts do so, and triers of fact are non-experts.

192. U.S. v Doremus, 414 F2 252 (6 Cir 1969)

At page 254: "[The] right to a fair trial may be violated if, after taking the stand [defendant] is forced to perform acts which would unjustly prejudice him. [Citations omitted.] This would be true in a case in which the requested performance or demonstration would unjustly humiliate or degrade the defendant or in a case in which such performance would be damaging to the defendant's image and irrelevant to the issue on trial." Taking handwriting exemplars before the jury entailed none of these.

193. U.S. v Doe, 321 FS 10 (D.C. NY 1970)

At page 11 are listed all of the reasons that were asserted for refusal. In making the order compelling the exemplars, by implication the Court rejected all of them.

194. U.S. v Rudy, 429 F2 993 (9 Cir 1970)

A criminal contempt sentence was upheld when defendant refused to furnish court ordered hand printing exemplars which were to be compared to a kidnap ransom note. No exemplars were found in a lawful search of defendant's person or apartment, so there was a need. He was not accused of involvement in the abduction itself.

The District Court ordered defendant to handprint the alphabet in the English language, making exemplars sufficient in quantity for an expert analysis. Defendant refused, thus the contempt finding. He contended that handprinting was subject to erroneous identification, a contention which could properly be addressed at trial.

195. State v Valentine, 20 NC Ap 727, 202 SE2 496 (1974)

The question was did defendant sign the motel registration card for the room in which heroin was found. Defendant argued that it was error for the trial court to permit him to testify to the differences between his signature and that on the registration card. At page 498 the Court of Appeals ruled: "[I]f this was error, it is prejudicial to the State not to the defendant. The defendant will not be granted a new trial upon error prejudicial to the State."

196. In the Matter of Braughton, Grand Jury Witness, U.S. v Braughton, 520 F2 765 (9 Cir 1975)

If contemnor had pointed out the specific part of the requested handwriting exemplar which violated the Fifth Amendment, the district court would have had to address that. But he did not, merely making a generalized assertion.

197. U.S. v In re Grand Jury Proceedings: Weiner; U.S. v In re Grand Jury Proceedings: Shinnick, 418 FS 941 (M.C. PA 1976)

A grand jury witness could be compelled to provide handwriting exemplars although there existed exemplars in military records for the period of 1967-1971. The grand jury could obtain exemplars for its own independent investigation, while the Government is entitled to "competent fresh evidence." Also, at trial, the Government would be confronted with a chain of possession problem to establish whose fingerprints and handwriting samples they were if the military records were used.

198. In re Grand Jury Proceeding, (Hergenroeder), 555 F2 686 (9 Cir 1977)

Headnote 2. "Grand jury witness did not have a 'supervisory-power' right to an affidavit from government that handwriting exemplar requested of him was relevant to an ongoing investigation by the grand jury and was 'not sought for some other purpose.'"

Referring to *In re Grand Jury Proceeding, (Schofield)* [Items 149, 165, 182], the Court said that "in this circuit the supervision of the grand jury by the district court is more narrowly construed."

199. In re Liberatore, 574 F2 78 (2 Cir 1978)

Civil contempt conviction was upheld for refusal to provide court ordered handwriting exemplars in a grand jury proceeding. The government is not required to make a preliminary showing of necessity, or that it does not already have the material, or that less coercive means are not available, or of the relevancy of the exemplars.

200. U.S. v Askew, a/k/a Kelley, 584 F2 960 (10 Cir 1978); certiorari denied, 59 L Ed2 94, 99 S Ct 1054

Defendant argued that there was denial of due process because of delays in his trial. However, the delay was caused by him, due in part to his refusal to comply with a court order to submit handwriting exemplars. The order for the exemplars was lawful, so the court possessed inherent power to enforce compliance through civil contempt. Additionally, the court had power to continue the proceedings until the defendant was purged of contempt.

201. State v Mitchell, 226 KS 776, 602 P2 1383 (1979)

The handwriting expert determined that writings by defendant on hand were not sufficient for a definite identification of defendant as author of handwriting found at the scene of a burglary, but that at least two pages more were needed. The district court's pre-arrest order compelling defendant to provide the exemplars was up-held. Police knew positively that two crimes had been committed and they had probable cause to believe that defendant committed them. Affidavits submitted to the court to that effect were sufficient to obtain a search warrant, and other search warrants had already been issued by the court.

202. Baranko v State, 406 S2 1271 (FL Ap 1981); dismissed without opinion, 412 S2 463 (1982)

At page 1272: "We find without merit appellant's contention that the state 'did not need' the handwriting exemplars requested, since it found a ready substitute in the ten documents introduced." Nor did the abundant handwritten pleadings, acknowledged by defendant as his, give merit to appellant's contention.

203. In re Grand Jury Subpoena served upon Yaasmyn Fula, 558 FS 50 (S.D. NY 1983)

Contemnor's offering "to identify sufficient samples of her handwriting would not justify releasing her from custody." Her continuing failure to comply was not reason to release her on basis that the order was thus futile. At pages 51-52, the Court gives this evaluation: "Fula's attempt to compromise indicates that the contempt sanction is beginning to affect her resolve." And it was a "self-serving prediction of non-cooperation." Humane considerations were no cause to release her, as it was in her power to end the ordeal by obeying the court's order.

204. In re Grand Jury Proceedings (Hellman), 756 F2 428 (6 Cir 1985)

Defendant had no Fourth or Fifth Amendment right to refuse to provide verbatim voice exemplars. Handwriting exemplar cases were cited by the Court in support of this proposition. Defendant had the burden of proving that the requested exemplars had no investigative justification. This was not proven.

205. In the Matter of the Special Federal Grand Jury Empaneled October 31, 1985, 809 F2 1023 (3 Cir 1987)

At page 1026, speaking of defendant's argument, the Court says: "As we understand the argument, it is that compulsion to *choose* a 'normal' style which is concededly not his customary style is tantamount to compelling an admission that it is normal for him to disguise his writing in the demonstrated manner."

At page 1026, the court reasons that "the meaning of the word 'normal' could only be that the sample should be uncontrived except insofar as directed." At pages 1026-7: "That the witness' name may be linked with backhand writing could not by itself implicate the witness in criminal conduct. Surely it is not illegal to disguise one's handwriting with a backward slant.... The potential [of identifying a writer] exists to the same degree whether the sample is backhand or forehand." The minimal thought required in writing uncustomary back slant "is of no significance in transforming physical evidence into testimony."

206. U.S. v Greene, 722 FS 1221 (E.D. PA 1989)

It was not a threat of arbitrary incarceration when officials told defendant that he could go to jail if he did not furnish the subpoenaed handwriting exemplars. It was merely a matter of telling him the truth and not coercion. This case contrasts with *U.S. v O'Kane* [Items 49, 170, 185] where the witnesses were not under subpoena to provide exemplars nor were they yet under the court's jurisdiction, while the defendant in this case was both under subpoena and under the court's jurisdiction.

207. U.S. v McVeigh, 896 FS 1549 (W.D. OK 1995)

This hearing dealt solely with a court order to comply with a grand jury subpoena for handwriting exemplars. Issues challenging the reliability of expert handwriting evidence were not involved in this early stage of the McVeigh prosecution.

On advice of counsel defendant had refused to comply with a grand jury subpoena and later with a court order for handwriting exemplars. Nine reasons for resisting the order were given at page 1552, and the reply the Court gave to each is indicated.

1) The subpoena was the product of illegal electronic surveillance. At page 1559: "The witness/Defendant has failed to raise a substantial factual issues [sic] as to the existence of illegal electronic surveillance as the source of the subpoena and directive."

2) There had been breaches of grand jury secrecy. At page 1560: "To date, the witness/Defendant has not made even a *prima facie* showing that grand jury secrecy violations have occurred." [Emphasis in original.] Besides, the remedy sought was not the appropriate one if such violation had occurred.

3) The exemplars were sought for another matter. See replies to similar arguments.

4) The exemplars were unreasonable search and seizure. Defendant had claimed that he regularly used printed handwriting, so cursive would be unreasonable search and seizure due to the mental effort it required; however, checks and other documents were produced on which he had used cursive writing. The constitutional protection does not hinge on a handwriting being constantly exposed to the public, but on whether the person has a legitimate expectation to privacy. So one hardly ever speaking in public still has no privacy expectation relative to the voice.

5) The subpoena was overly broad. The grand jury had stated that the exemplars were required to determine authorship of relevant documents. The forms to be used were similar to those routinely used, and the Court examined the three exemplars requested.

6) The subpoena was improperly issued. In support of this contention, the composition of the grand jury was challenged, but a witness before a court or grand jury is not entitled to challenge its authority; and, besides, the proper procedure for constituting the jury had been followed. At page 1558: "And finally, even absent a valid grand jury subpoena and directive, the Court has independent authority to order the handwriting exemplars under the All Writs Act."

7) There was an improper purpose of obtaining evidence for a criminal case, rather than to determine probable cause. Defendant had the burden of proving that there was no reasonable possibility that the exemplars would produce relevant information. He did not. As to the probable cause argument, the Government has no obligation to indict at the point of probable cause rather than waiting for stronger evidence.

8) The exemplars were for trial both "here" and in Michigan. At pages 1557-1558: "Such rank speculation or supposition is insufficient to overcome the presumption of regularity that attaches to the grand jury's acts [citation omitted], or to raise a substantial factual issue as to the purpose for which the subpoena and directive were issued."

9) As drawn, the exemplars would make defendant a witness against himself. At page 1561: "[B]ut the thought processes involved [in producing cursive writing versus printed] are not revealed, only the products thereof...." And at page 1562: "The exemplars are nontestimonial because they do not reflect any communication by the witness of his beliefs, knowledge of facts or assertions of fact."

IV. Other Consequences to a Refusal or Disguise of Exemplars

Once a defendant refuses to comply with a valid court order to make handwriting exemplars, such refusal becomes proper evidence at his trial, even if he later purges himself of the contempt and cooperates fully. Although lawful refusal, protected by constitutional safeguards, may not be used against a person, unlawful refusal is generally taken as indicative of a consciousness of guilt.

A. Legal Inferences

208. People v Blackwell, 257 CA Ap2 313, 64 CA Rptr 642 (1967)

Headnote 7. "Forgery prosecution defendant's refusal to give handwriting exemplar indicated consciousness of guilt."

209. U.S. v Doe (Devlin), 405 F2 436 (2 Cir 1968)

At trial, the prosecution may refer to the refusal to give exemplars.

210. People v Hess et al., 10 CA Ap 3d 1071, 90 CA Rptr 265, 43 ALR3 643 (1970)

The prosecution may argue to the jury that defendant's refusal to provide exemplars raised an inference of guilt.

211. U.S. v Nix, 465 F2 90 (5 Cir 1972); certiorari denied, 409 U.S. 1013, 93 Sup. Ct 455 (1972)

The prosecution may refer to defendant's refusal to give handwriting exemplars as indicative of guilt, and the jury may be charged that, if they find the refusal proven beyond a reasonable doubt, they can infer that comparison with valid exemplars would have favored the prosecution.

213. State v Haze, 218 KS 60, 542 P2 720 (1975)

At page 723, regarding the purported testimonial aspect of a refusal to give exemplars, the Court said: "The refusal is in substance an indication of the conduct of the accused and it is this conduct, rather than the oral utterance, which provides the basis for the inference of a consciousness of guilt. . . . He in no way cooperated with, or provided testimony for, his prosecutors by the refusal. On the contrary, he was being as uncooperative as possible and evidence of these actions and his intent to continue them was properly presented to the jury."

214. U.S. v Wolfish, 525 F2 457 (2 Cir 1975); certiorari denied, 96 S Ct 794 (1976)

The Government's comments that disguise was further evidence of guilt was not a violation of Fifth Amendment rights.

215. People v Manson et al., 61 CA Ap3 102, 132 CA Rpt 265 (1976)

Defendant Krenwinkel refused to give the handwriting sample ordered by the court. That refusal tended to show consciousness of guilt, and the prosecutor could so argue.

216. U.S. v Wolfish, 525 F2 457 (2 Cir 1975); certiorari denied, 96 S Ct 794 (1976)

The Government's comments that disguise was further evidence of guilt were not in violation of Fifth Amendment rights.

217. U.S. v Askew, a/k/a Kelley, 584 F2 960 (10 Cir 1978); certiorari denied, 59 L Ed2 94, 99 S Ct 1054

Defendant had refused to provide court ordered exemplars prior to trial. When he repeated his refusal in open court, an inference of guilt was justified.

218. Owens v Wolff, 532 FS 397 (D.C. NV 1981)

Refusal to give compelled handwriting exemplars was probative of consciousness of guilt.

219. People v Igaz, 326 NW2 420 (MI Ap 1982)

It was not a violation of defendant's Fifth Amendment rights when the expert said that defendant had disguised his handwriting in making court ordered exemplars, nor when the prosecutor referred to that as indicative of guilt. At page 428: "The general rule is that a court may force a defendant to provide handwriting exemplars."

220. U.S. v Shively, 715 F2 260 (7 Cir 1983); certiorari denied, 79 L Ed2 233, 1104 S Ct 1001

Court ordered exemplars were disguised according to the expert, whom the judge did not permit to testify at the first trial. At the second trial, though all signatures were stipulated to, the court reconsidered and permitted the expert's testimony solely to show consciousness of guilt.

221. U.S. v Campbell, 732 F2 1017 (1 Cir 1984)

After a hearing regarding an initial refusal to provide the requested exemplars, the Court of Appeals ruled that at trial comment could be made on further refusal to give exemplars.

222. State v Deutsch, 713 P2 1008 (NM Ap 1985)

Expert testimony that the defendant had attempted to disguise his handwriting samples was admissible and indicative of consciousness of guilt and was not character evidence.

223. U.S. v Jackson, 886 F2 838, 28 Fed Rules Evi Serv 1141 (7 Cir 1989)

The district court had granted defendant's motion in limine to prohibit the Government from showing that he had refused to give handwriting exemplars. The grant of the motion was reversed upon the Government's appeal. Refusal to give compelled handwriting exemplars "was probative of consciousness of guilt."

224. People v Clark, 5 CA4 950, 22 CA Rptr2 689, 857 P2 1099, 93 CDOS 6528, 93 Daily J DAR 11122; petition for certiorari filed (1994)

A murder/rape conviction was appealed.

Defendant refused to comply with a court order to provide a handwriting exemplar which was sought in order to link blood stained jeans to defendant, this would be done if his handwriting matched that on notes found in the pockets of the jeans. His refusal to give the exemplars was permissible evidence of his consciousness of guilt.

225. State v Robidoux, 662 A2 268 (NH 1995)

At page 271: "The defendant's final argument is that the trial court erred by instructing the jury that the defendant had refused to provide a handwriting exemplar and that the jury could infer from that refusal that the exemplar would be unfavorable to the defendant." The Supreme Court of New Hampshire rejected defendant's argument.

226. U.S. v McDougal, 137 F3 547 (8 Cir 1998)

At page 559: "The handwriting itself (as opposed to the content of a written statement) is physical, not testimonial evidence. Further, evidence that a defendant attempted to disguise his or her handwriting is permissible, since otherwise the defendant could frustrate the government's right to obtain sample." [Citations omitted.]

227. U.S. v Brown, 156 F3 813 (8 Cir 1998)

In a drug case, there was no disguise of compelled exemplars, but rather a flat refusal to make them. The ruling of the Court of Appeals, reported at page 815, can be considered as applying when such exemplars are disguised, since some courts have equated disguise of exemplars to a refusal to provide them: "Brown was ordered to furnish a handwriting sample so that it could be compared to certain incriminating documents which allegedly were in his handwriting. He refused.... Brown's refusal to give an exemplar was not privileged, and the jury could properly consider his refusal as evidence that the results of that testing would have been adverse [to him]."

B. Other Legal Consequences

228. U.S. v Izzi, 427 F2 293 (2 Cir NY 1970); certiorari denied, 399 US 928, 26 L Ed 2 794, 90 S Ct 224

The prosecution may point out and explain the differences between disguised exemplars and the disputed writing identified by the expert as having been made by defendant, particularly when defendant uses such differences as argument for non-identity.

229. U.S. v McGann and Pruitt, 431 F2 1104 (5 Cir 1970); certiorari denied, Pruitt v U.S., 401 US 919, 27 L Ed2 821, 91 S Ct 904

The prosecution may present evidence of disguise in court ordered exemplars.

230. U.S. v White, 444 F2 1274, 1280 (5 Cir 1971); certiorari denied, 404 U.S. 941, 91 Sup Ct 1643 (1970)

It was not abuse to let a probation officer testify to defendant's signatures in the department's files, when defendant successfully resisted attempts to have exemplars by court order and evidence was not readily had elsewhere.

231. U.S. v Driver, 462 F2 808 (5 Cir. 1972); certiorari denied, 409 U.S. 1061, 93 Sup. Ct. 468 (1972)

At page 810-811 is described how the trial judge had ordered "complete exchange of scientific testing concerning Driver's handwriting...." Defendant even had a handwriting expert at Government expense. When he refused to provide handwriting exemplars, "the trial judge amended his order to excuse the Government from producing the results of its own tests."

232. People v Paine, 33 CA Ap3 1048, 109 CA Rptr 496 (1973)

Headnote 2. "Attorney-client privilege did not preclude defense counsel for accused, who was charged with passing fictitious checks and who refused to obey order to provide handwriting exemplars, from being compelled to turn accused's papers over to prosecutor for handwriting comparison."

233. In the Matter of Braughton, Grand Jury Witness, U.S. v Braughton, 520 F2 765 (9 Cir 1975)

Headnote 7. "Where contemnor had categorically refused to complete any part of handwriting exemplar in an appearance before grand jury, district judge was under no duty to negotiate with him."

234. U.S. v Waller, 581 F2 585 (6 Cir 1978); certiorari denied, 439 US 1051, 99 S Ct 731, 58 L Ed2 711

Headnote 1. "Defendant's writings on yellow pad, seized after defendant took flight from trial, were not privileged communications, where writings were not intended as confidential communications between attorney and client and where writings were used only for comparison with signatures on checks after defendant had refused to provide police a sample of his handwriting."

At page 586 it is described how, when a six-year old fingerprint card was introduced with his signature, defendant excused himself supposedly to go to the restroom, but he never returned. Convicted in absentia, he was apprehended a year later.

235. U.S. v Blankney, 581 F2 1389 (10 Cir 1978)

The prosecutor may cross-examine defendant on his refusal to provide handwriting exemplars, since he had no right to withhold the exemplars.

236. Watkins v State, 151 GA Ap 510, 260 SW2 547 (1979)

The handwriting expert testified to an "attempt to disguise appellant's true signature." At page 549, some reasons for this opinion are given: ". . . a stilted, unnatural style of writing, [showing] awkward, abrupt pen movement . . . not a natural writing."" Consequently, forged checks from an earlier conviction were used as exemplars since they had a "free flowing, natural style of writing, no evidence to indicate an awkward or abrupt pen movement. . . ."

237. Lowery v State, 402 S2 1287 (FL Ap 1981)

Headnote 4. "Trial court in prosecution for uttering a forged check did not err in allowing testimony to be introduced regarding defendant's failure to appear for taking his handwriting samples, since evidence of refusal to submit to a scientific test is both admissible and compulsory."

The exemplars were court ordered.

238. Baranko v State, 406 S2 1271 (FL Ap 1981); dismissed without opinion, 412 S2 463 (1982)

The state did not have to comply with defendant's discovery demand until defendant provided the court ordered handwriting exemplars.

At page 1272: "We find without merit appellant's contention that the state 'did not need' the handwriting exemplars requested, since it found a ready substitute in the ten documents introduced." Nor did the abundant handwritten pleadings, acknowledged by defendant as his, give merit to appellant's contention.

239. In re Grand Jury Subpoena served upon Yaasmyn Fula, 558 FS 50 (S.D. NY 1983)

The contemnor's offering "to identify sufficient samples of her handwriting would not justify releasing her from custody." She was held for not providing hair and handwriting exemplars.

Her continuing failure to comply was not reason to release her on basis that the order was thus futile. At page 51-2: "Fula's attempt to compromise indicates that the contempt sanction is beginning to affect her resolve." And it was a "self-serving prediction of non-cooperation." Humane considerations were no cause to release her as it was in her power to end ordeal by obeying court's order.

Defendant was properly compelled to provide handwriting exemplars when she acknowledged papers contained her genuine handwriting, but she had not identified a sufficient amount for comparison.

240. Huhn v State, 511 S2 583 (FL Ap 1987)

At page 589, it was ruled that AFT forms may be used as exemplars at retrial only if other material is not sufficient, "because of the trial court's conclusion, on remand, of some artifice on the defendant's part."

241. U.S. v Jackson, 886 F2 838, 28 Fed Rules Evi Serv 1141 (7 Cir 1989)

Evidence of defendant's refusal to provide requested handwriting exemplars was not inherently prejudicial. The probative value of that evidence was not substantially outweighed by any unfair prejudice, and any danger could be minimized by a jury instruction. The refusal to provide court ordered exemplars was equated by the Court to evidence of flight and concealment.

242. Wilson v State, 596 S2 775 (FL Ap 1992); rehearing granted, 1992 FL Ap LEXIS 4117 (FL Ap), reported in full 17 FLW D936

Refusal to provide exemplars pursuant to court order was admissible in evidence, though defendant was not appraised either that it was compulsory or of the consequences. Comment on the refusal did not violate defendant's right to remain silent.

C. Limits to the Legal Consequences

Besides the cases cited in this sub-section, previously cited cases indicate the cautions and limitations to be observed. When, for example, court cases state that handwriting exemplars as physically identifying characteristics are not privileged under the Fifth Amendment, they clearly warn us that once they become communicative or unfairly prejudicial in any way, they are privileged and may not be used unless the prejudice can be overcome, such as by redacting the offending portions of a writing.

243. People v Mayo, 194 CA Ap2 527, 15 CA Rptr 366 (4 Dist 1961)

Though not a handwriting case, this case provides a caution of asserting too much concerning a refusal to provide court ordered exemplars, since the general rule applies to any type of evidence one is required, or consents, to provide.

A falsehood practiced by defendant supports the proof of guilt but does not substitute for it. At page 370: "While it is true that a wilful falsehood by the defendant on a matter materially connected with the offense charged may produce a strong suspicion of guilt or, under some circumstances, even an admission of guilt, People v. Osslo, 50 Cal.2d 75, 93 [4], 323 P.2d 397, it cannot be used to supplant or take the place of an entire lack of evidence on an essential ingredient of the corpus delicti."

244. People v Paine, 33 CA Ap3 1048, 109 CA Rptr 496 (1973)

A search and seizure contention on appeal would not have been successful. The argument that defendant's possession of the papers would mean his furnishing evidence of identity was without merit, since the prosecutor would still have the burden of proving the papers had his handwriting. "Possession does not establish that fact since it is not unusual for one to have papers in his possession written by others."

245. Wilson v State, 596 S2 775 (FL Ap 1992); rehearing granted 1992 FL Ap LEXIS 4117 (FL Ap), reported in full 17 FLW D936

The modified "flight" instruction which related to defendant's refusal to give handwriting exemplars pursuant to a court order was impermissible comment evaluating the evidence.

246. State v Harris, 839 SW2 54 (1992)

At page 71: "The Defendant also challenges as unconstitutional the court's charge regarding the inference to be drawn from his refusal to give handwriting samples. The Defendant says that the instruction shifted the burden of proof.... There is no merit in the argument because the instruction, which clearly charged jury that any inference was permissive and rebuttable, did not relieve the State of proving an element of the offense.... [Citations omitted.]"

247. U.S. v Stone, 9 F3 934 (8 Cir 1993)

A government agent was serving a summons for handwriting exemplars. He gave a Miranda warning and explained the right to counsel, but Stone refused to provide the exemplars. On a second and a third occasion the agent explained that there was no

constitutional privilege for exemplars, but Stone refused twice more. At page 936 the Court of Appeals explained: "At the Government's request, the district court instructed the jury that, although not dis positive, Stone's refusal to obey the handwriting summons was probative of his consciousness of guilt. The Government relied on this evidence in its closing argument." It was proper for the district court to permit this, but note that, though it was probative, it was not dispositive. Other proof was required.

V. Propriety of Expert Testimony as to Disguise in Exemplars

The cases cited below in Sub-section B, wherein the handwriting expert was permitted to testify as to disguised writing, did not involve disguise in the compelled exemplars. One of them is cited elsewhere in this paper. It and the selected few others are given as examples of the goodly number of reported court cases which permit expert testimony as to disguise in handwriting. So the few cases given in Section V are part of a much larger, and well established, court practice.

A. Specifically In Compelled Exemplars

248. Nolan v American Telephone & Telegraph Co., 326 IL Ap 328, 61 NE2 876 (1945)

The Court of Appeals found that plaintiff had deliberately disguised exemplar signatures written after the action was brought, doing so by insisting on the use of a different type pen. Her signatures which were made prior to her deciding to bring action nicely matched the disputed signature. Those made afterwards were disguised.

249. U.S. v Izzi, 427 F2 293 (2 Cir 1970); certiorari denied, 399 US 928, 26 L Ed 2 794, 90 S Ct —

F. E. Webb was prosecution expert and, as reported at page 296, testified that exemplars had been written much slower. The prosecutor sought to impeach the defense's handwriting expert by pointing out differences between the exemplars and Izzi's "normal," "fluent" signatures.

250. U.S. v McGann and Pruitt, 431 F2 1104 (5 Cir 1970); certiorari denied, Pruitt v U.S., 401 US 919, 27 L Ed2 821, 91 S Ct 904

At page 1110: "The trial court ordered that he give samples of his own handwriting. He voluntarily chose to disguise it, in violation of the order. The deceptive characteristics of the samples were furnished by him at a time when he was represented by counsel. Furthermore, the record indicates that the government's handwriting expert did not comment on the disguised exemplar, but merely made comparisons of the various letters to indicate the manner of writing. We find that any of the comments on the exemplar were not more testimonial than the exemplar itself. Any unpropitious conclusion to be drawn from the exemplar may have been dispelled by appellant's right to cross-examine...."

251. U.S. v Stembridge and Stembridge, 477 F2 874 (5 Cir 1973)

The prosecutor solicited testimony about disguise on redirect to explain the difficulty in identifying the writer.

252. U.S. v Wolfish, 525 F2 457 (2 Cir 1975); certiorari denied, 96 S Ct 794 (1976)

Mrs. Vadar Tamir was the Government's handwriting expert from Israel. She did not use the court ordered exemplars in making her comparison. Defense counsel on voir dire attempted to establish them as valid exemplars exonerating defendant. So on redirect the prosecutor had the expert explain that disguise prevented her from using them.

Defense counsel in closing argument attacked Mrs. Tamir's ability to determine disguise in exemplars. The trial judge read her testimony to the jury about how defendant refused to write entire words and wrote from the bottom of the paper to the top rather than from top to bottom. The Court of Appeals said that the trial judge acted properly.

253. Watkins v State, 151 GA Ap 510, 260 SW2 547 (1979)

The expert testified about an "attempt to disguise appellant's true signature." At page 549 reasons are given for this opinion: ". . . a stilted, unnatural style of writing, [showing] awkward, abrupt pen movement . . . not a natural writing."

254. People v Igaz, 326 NW2 420 (MI Ap 1982)

It was not a violation of defendant's Fifth Amendment rights when the expert said that defendant had disguised his handwriting in making court ordered exemplars, nor when the prosecutor referred to that as indicative of guilt.

255. Turner v State, 636 SW2 189 (Cr Ap TX 1982)

At page 194 is described how the expert used a signature to which the parties had stipulated, two letters written in the presence of witnesses, and a bank loan application. The Court had appellant write, "but the expert disregarded it because, in his opinion, the appellant was not writing normally." Thus the expert testified to disguise in the court ordered exemplar.

256. U.S. v Shively, 715 F2 260 (7 Cir 1983); certiorari denied, 79 L Ed2 233, 1104 S Ct 1001

Court ordered exemplars were disguised according to the expert, whom the court did not permit to testify at the first trial. At the second trial, though all signatures were stipulated to, the court reconsidered and permitted the expert testimony as to disguise solely to show consciousness of guilt.

257. State v Deutsch, 713 P2 1008 (NM Ap 1985)

Expert testimony that defendant attempted to disguise his exemplars was admissible, indicated consciousness of guilt, and was not character evidence.

The examiner made a probable identification for two endorsements as having been signed by defendant, three may have been, and two she could not tell. The reason for her uncertainty was that the first set of exemplars were insufficient and, at pages 1014-1015: "The examiner testified the November exemplars were worthless because they were an attempt by Deutsch to disguise his

natural handwriting." The examiner gave reasons for the opinion and testified to her expertise and experience in detecting disguise.

258. Huhn v State, 511 S2 583 (FL Ap 1987)

At page 587: "Mr. Dick stated that the block printing style of the defendant's handwriting exemplars was indicative of an intentional disguise of handwriting."

259. U.S. v Hollins, 811 F2 384 (7 Cir 1987)

At page 389, expert Roy Mantle of the Postal Service said that "it was 'highly probable' that Hollins has written all of the questioned handwriting on these exhibits. Mantle testified that he could not be absolutely positive because Hollins had, in his opinion, intentionally disguised his handwriting."

260. Huspon v State, 545 NE2 1078 (IN 1989)

The expert determined that defendant had disguised the court ordered exemplars. Therefor the police obtained a warrant to search defendant's cell in order to obtain genuine samples. The samples were properly ruled genuine since defendant had been ordered to gather up his belongings, and the exemplars came out of what he had gathered up.

B. In General

261. Commonwealth v Webster, 59 MA (5 Cush) 295, 52 Am Dec 711 (1850)

This was a murder case. On appeal it was ruled that a handwriting expert may testify that anonymous letters were disguised to divert suspicion and were written by defendant, and the expert may give his reasons for the opinion. The court also noted that testimony on disguised handwriting had always been considered admissible in cases of anonymous writings.

262. McGarry v Healey, 78 CT 365, 62 A 671 (1905)

A handwriting expert was allowed to testify as to which traits in a person's disguised writing would appear in undisguised writing and as to the possibility of repeating the manner of disguise. At pages 671-2: "The interrogator was by both questions seeking to show from the experience and observation of the skilled witnesses that peculiarities mark the handwriting of an individual even in the presence of attempts at disguise, so that comparisons even as between disguised and undisguised writings, or as between different disguised writings, furnish intelligent bases for conclusions as to the identity of the writer.... The questions were properly admitted."

263. In re Thomas' Estate, 155 CA 488, 101 P 798 (1909)

At page 801, the court said: "Certainly in the majority of instances the mind of the expert and trained observer, disciplined to discern not only obvious similarities but to detect as well dissimilarities, disguised under the appearance of similitude, will arrive at a result more correct than will that of the untrained observer."

264. Mann v State, 33 AL Ap 115, 30 S2 462 (1947); certiorari denied, 249 AL 165, 30 S2 466 (1947)

This case has been cited already in this paper on other issues.

C. D. Brooks was the handwriting expert who testified to use of the opposite hand, as compared to regular exemplars which were not made with the opposite hand.

Although he did not testify as to exemplars being in disguise as we are considering that topic (that is, contrary to the court's instructions otherwise), using the opposite hand is a method of disguise, and so this case supports admissibility of expert testimony generally as to disguise in handwriting.

265. Corn v State Bar of California, 68 CA2 461, 67 CA Rptr 401, 439 P2 313 (1968)

It was proper for the handwriting expert, from comparison of signatures, to testify, first, that both were written by the same person and, second, that the purported signature of payee on the warrant was so disguised as to deceive the average person into believing that a different person wrote it, so that the expert addresses the issue of the writer's state of mind. Petitioner admitted writing both his and another person's name as payee on the warrant, but he claimed that it was in his normal style. The hearing officers of the state bar had wanted to know if there was evidence of deceit in writing the other name.

At page 315: "In comparing the signatures on the back of the warrant, the handwriting experts pointed out that the name 'L. L. Siemons' appeared to have been signed with a ballpoint instrument in blue ink, while petitioner's signature appeared to have been signed with a fountain pen having a wide tip and containing black ink; that two different methods of writing were used, petitioner's signature having been written in a free flowing hand and the other signature at a slower speed; and that there was a difference in the size and line quality of the writing." In writing "L. L. Siemons" on the warrant, the petitioner had used printing, but on the receipt he used cursive capitals. Also, the questioned signature showed less skill.

As in *Mann v State* above, the testimony is not as to disguise in exemplars, but in this case the California Supreme Court ruled that it was proper for the expert to testify as to disguise in the writing in question. The handwriting expert thus impeached Corn's testimony that he had only written in his normal style.

VI. Concluding Remarks

These cases do not represent most, much less all, the relevant cases. An inference which can justly be made is that the courts, in upholding the compelling of handwriting exemplars, also uphold the reliability of the expert handwriting identification which will be made based on these exemplars. If expert handwriting identification were not in the main reliable, the compelling of an accused to submit to such an identification process would be in violation of the right to due process. Equally cogent is the inference that the various legislatures would not have enacted statutes authorizing expert handwriting comparison evidence if there were not substantial evidence before them concerning its reliability.

This project began in an actual case where the true culprit had written many anonymous notes, bomb threats, and graffiti on her apartment walls, using various disguises. She and her husband conspired to have an innocent party investigated by several law enforcement agencies as the perpetrator of the anonymous notes and the graffiti. It was determined that one of the best ways to defend the unjustly accused was to reinvigorate the pending case against the true culprit relative to the bomb threats. Reports were made and

submitted to the police department and district attorney's office. One report identified the true culprit as the writer of all the anonymous materials, the graffiti and the bomb threats; a second report explained how to take proper requested exemplars from her; and a third backed it all up with citations to court cases. This third report has been expanded several-fold into this paper.

It is hoped that this collection of citations might serve to support the testimony of proper expert handwriting evidence against unfounded challenges.

Index of Cases Cited

Numbers after each case refer to the item or entry numbers in the body of the paper. When a case has been cited more than once, the item number is given for each time it has been cited.

Guide to Abbreviations of Court Case Reporter Series

The following list of abbreviations to reporters cited in this paper provides the full title of the respective reporter series. Readers will see alternative abbreviations for many of these reporters. Any law library will have the major reporter series and will assist in the research. Not included in the list are reporters which are designated by a standard state abbreviation, since they are self-explanatory. For example, "CA" means California Supreme Court Reporter, and with a number it means a succeeding series of the same reporter. Thus "CA2" means "California Supreme Court Reporter, Second Series." Similarly, "CA Ap" means "California Appellate Reporter."

A	Atlantic Reporter, First Series
A2	Atlantic Reporter, Second Series
ALR	American Law Reports, Annotated, First Series
ALR2	American Law Reports, Annotated, Second Series
ALR3	American Law Reports, Annotated, Third Series
Am Dec	American Decisions
Ap DC	District of Columbia Appellate Reporter
CA Rptr	West's California Reporter
F	Federal Reporter, First Series
F2	Federal Reporter, Second Series
F3	Federal Reporter, Third Series
FS	Federal Supplement Reporter
KB	King's Bench
L Ed2	U.S. Supreme Court Reporter, Lawyers Edition, Second Series
NE2	Northeastern Reporter, Second Series
NW2	Northwestern Reporter, Second Series
P	Pacific Reporter, First Series
P2	Pacific Reporter, Second Series
Pick (MA)	This is a series within the overall series of the Massachusetts Reporter
S2	Southern Reporter, Second Series
	S Ct, or: Sup Ct Supreme Court of U.S. Reporter
SE2	Southeastern Reporter, Second Series
SW2	Southwestern Reporter, Second Series
US	United States Supreme Court Reporter